Supreme Court, U.S.
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No. 80-878

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ELLIS OLKON,
Petitioner,
vs.
STATE OF MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do the doctrine of entrapment and due process of law forbid conviction for a non-contraband offense (attempted theft) where extensive police deceptions assure the accused, a lawyer of good reputation not suspected of any wrongdoing, that the conduct solicited is not unlawful, in the following circumstances:

A police agent posing as an accident victim, wearing a neck brace and walking as if in pain, tells the lawyer he was injured and confirms the injury by producing another agent posing as his companion in the accident, an offical accident report fabricated by police, a repair bill for the vehicle, medical reports from two doctors (which say the patient is mentally unstable as well as physically injured), and billings for lengthy actual hospitalization and treatment for the injuries; the agent conceals the fact that he has an actual pre-existing injury from the doctors and the lawyer; the medical society (at police instigation) falsely tells the lawyer upon two inquiries that the doctor in question is in good standing; two insurance companies (also in collusion with the police) falsely represent to the lawyer they have coverage and (again at police urging) settle the case without adversary investigation; the police agent makes intentionally ambiguous statements, inconsistent with the other evidence, that he was not really injured, but never claims the accident did not actually occur; and there is no evidence of the lawyer's predisposition to commit any fraud?

REPORTS OF OPINIONS BELOW

The opinion below, *State v. Olkon,* — NW2d — (filed August 29, 1980, Minnesota Supreme Court, No. 315 - 50966) is not yet reported, but appears in the Appendix hereto.

JURISDICTION

Date of Judgment Sought to be Reviewed: August 29, 1980.

Date of Order Denying Rehearing: September 29, 1980.

Statutory Provision Believed to Confer Jurisdiction: 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person wthin its jursdiction the equal protection of the laws.

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No. ———

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Petitioner,
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STATE OF MINNESOTA,
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On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner is a Minneapolis, Minnesota, lawyer, convicted of two counts of attempted theft by swindle[1] for submitting insurance claims on behalf of a disguised police officer posing as a personal injury client who, with the aid of law enforcement and other agencies and insurance companies, presented extensive evidence of his accident and injuries including accident and medical reports, and then said he was not really injured.

---

[1] The jury was unable to agree on two counts of conspiracy.

During an investigation of medical fraud, police devised a scheme to have a disguised officer (Powers) approach a suspected doctor (Dr. Coifman) posing as an accident victim interested in making a fraudulent insurance claim; Powers had an official accident report and false identification documents, fabricated by police; Coifman examined Powers and prescribed a neck brace and hospitalization. A Coifman associate (Neff, not a doctor) referred Powers to one lawyer, but Powers knew that lawyer and he asked for another; Neff then suggested Petitioner Olkon, a Minneapolis lawyer of excellent reputation for honesty, integrity and community service, about whom nothing untoward was suspected, who thus became involved in the police scheme quite by chance.

Powers called Petitioner's office on June 22, 1978, telling a paralegal he and a friend (Elizabeth Saunders, also a disguised police agent) had been rear-ended, were being treated by Coifman, and asking for an appointment or to have Petitioner visit him at a hospital where he expected to be confined. On June 26, Powers came to Petitioner's office,[2] wearing a neck brace and walking stiffly, as if in great pain, with Saunders; both described the accident and their injuries to Petitioner and his assistant, and Powers presented an official police accident report and receipt for obtaining it, both reproduced below, (we set these documents out so the Court will appreciate their official and persuasive appearance and understand the persuasive impact they would have upon any lawyer to whom they were presented):

---

[2] At this time Petitioner was under the stress of being a witness in a case in which he, his wife and mother-in-law had been robbed, Petitioner tortured, and his children threatened by a man who killed an assistant U.S. Attorney in California.

NO. 794

June 22 1978

RECEIVED FROM Eugene Bowers

Two and no/100 DOLLARS

accident report #78006590

Account Total $ —

Amount Paid $ 2.00

Balance Due $ —

N. Hagfors

"THE EFFICIENCY LINE" AN **AMPAD** PRODUCT

DPS 32003 (7-76)

STATE OF MINNESOTA - DEPARTMENT OF PUBLIC SAFETY

PAGE 1 OF 1

TRAFFIC ACCIDENT REPORT
(FOR POLICE USE ONLY)

LOCAL CODES: ~~78~~-006590

NO. VEHS. 2 | NO. KILLED 0 | NO. INJUR. 0 | PUBLIC PROP DAM ☐ | HIT-RUN ☐

1 — 1
DATE OF ACCIDENT: MONTH 6 DAY 16 YEAR 78 | DAY OF WEEK: FRIDAY | TIME: 0102 ☒ AM ☐ PM | COUNTY: HENN | ☒ CITY ☐ TWP OF: EDINA

2 — 1
ROUTE SYSTEM ON: CSAH | ROUTE NUMBER OR STREET NAME: #158 VERNON AVE. | ☒ AT INTERSECTION WITH ☐ MILES ☐ FEET

ROUTE SYS: CSAH | ROUTE #, STREET NAME, CITY LIMITS, REF POST, OR FEATURE: #20 INTERLACHEN BLVD. | REFERENCE POINT: ___+___.___

EXHIBIT 3-A DEFT.
Dale S. Embretson, Reporter

14 — 11

UNIT NO. 1 - VEHICLE 1 | UNIT NO. 2 - ☒ VEH 2 ☐ P

3 — —

	DRIVER	
DRIVER LICENSE NUMBER - 1: Not in Possession	STATE: MN	DRIVER LICENSE NUMBER - 2: B-652-441-071-412 MN
FIRST NAME / MIDDLE / LAST: EUGENE (NMN) BOWERS		FIRST NAME / MIDDLE / LAST: JOSEPH ARMANDO BARNES
NUMBER AND STREET: 217 RIDGEWOOD		NUMBER AND STREET: 7340 York Av. So.
CITY: Mpls. STATE: MN ZIP CODE: 55415		CITY: EDINA STATE: MN ZIP CODE: 55410
DATE OF BIRTH: 9/25/42 SEX: M INVALID LICENSE ☐ RESTRICTIONS NOT COMPLIED WITH ☐ CLASS: C		DATE OF BIRTH: 6/1/14 SEX: M INVALID LICENSE ☐ RESTRICTIONS NOT COMPLIED WITH ☐ CLASS: C

4 — 3
15 — 10
5 — —
16 — 6
17 — 6

	OWNER	
FIRST NAME OWNER - 1 / MIDDLE / LAST: SAME		FIRST NAME OWNER - 2 / MIDDLE / LAST: SAME
NUMBER AND STREET:		NUMBER AND STREET:
CITY / STATE / ZIP CODE:		CITY / STATE / ZIP CODE:

6 — 2
18 — 1
19 — —

	VEHICLE	
VEHICLE TYPE: VAN	YEAR AND VEHICLE MAKE: 1977 FORD	COLOR: ~~BLUE~~ BLUE
LICENSE PLATE NO.: R29-606 YEAR: 78	STATE OF ISSUE: MN	NO. OCCUP: 2
VEHICLE TYPE: Auto	YEAR AND VEHICLE MAKE: 1978 CAD.	COLOR: BRN + WHT
LICENSE PLATE NO.: DPL 791 YEAR: 78	STATE OF ISSUE: MN	NO. OCCUP: 2

20 — 3
21 — —

7 — 4

DAMAGED UNIT NUMBER 1: 9 TOP, 10 BOTTOM — (5) $750.00 EST DOLLAR AMT

☒ 1 REAR END ← ←
2 OVERTAKING ← ←
3 LEFT TURN
4 OFF RD LEFT
5 INTERSECTION RIGHT ANGLE
6 RIGHT TURN
7 OFF RD RIGHT
8 HEAD ON → ←
9 SIDE SWIPE

DAMAGED UNIT NUMBER 2: (1) 9 TOP, 10 BOTTOM — $700.00 EST DOLLAR AMT

22 — 1
23 — 1

8 — 3
9 — 2
10 — 1
11 — 5
12 — 2
13 — 30

10: INDICATE NORTH BY ARROW (N)

DESCRIPTION: VEHICLE #1 CAME TO A STOP ON VERNON AVE., FOR A RED LIGHT AT INTERLACHEN BLVD., VEHICLE #2 WAS FOLLOWING BEHIND VEHICLE #1 AND FAILED TO REACT IN TIME TO STOP AND COLLIDED WITH THE REAR OF VEHICLE #1.

LOCAL CODES 78-006590

NAMES OF INJURED PERSONS/WITNESSES

	NAMES OF INJURED PERSONS/WITNESSES	24	25	26	27	28	29	30
A	ELIZABETH ANN SAUNDERS	1	25	F	3	2	1	0
B	MARY JO BARNES	2	23	F	3	2	1	0
C								
D								
E								

NAME AND ADDRESS OF OWNER OF DAMAGED PROPERTY OTHER THAN VEHICLE

SIGN HERE
OFFICER'S RANK AND NAME: Walter E. Johnson | BADGE NO.: 444 | CITY: EDINA | DEPARTMENT OR AGENCY: ☐ STATE PAT ☐ SHER ☒ LOCAL ☐ OTHER | RECOMMENDATIONS: ☐ ENGINEERING ☐ PHYSICAL DR.___
ASSISTING: | BADGE NO.: | CITY: | DEPARTMENT OR AGENCY:

The other driver, Mr. Barnes, existed; the information about him was correct; he, too, was cooperating in the police scheme. Powers also carried a falsified driver's license and a falsified welfare card, and he gave Petitioner a repair bill for the damage to the vehicle, as follows:

OSTLUND AUTO BODY

133 - SW COUNTY ROAD 18 — OSSEO, MINNESOTA 55369
Phone: 425-2226 [redacted])

EXHIBIT 3-B DEFT.
Dale S. Embretson, Reporter

Small Business + Low Overhead = Individual Attention and Lower Prices
Specialists in VW Repair

6-19-78

Replace	Repair	Description of Repair	Parts	Labor
✓		Rear Bumper - Recon.	88.00	1.5
		straighten - Rear - 1/4		6.5
		molding -	14.00	.5
		Align - Rear - door -		1.5 -
		And Materials Supply -	10.00	
		Refinishing Material -	28.00	
		Refinishing -		4.0
			$140.00	14.0

[redacted] Eugene Bowers -

77 Ford van Blue 2 tone - Lic. R 29-606.
Estimate Subject to Revision - in ~~30~~ 90 days -

Total Labor 14 X 12.00	168.00
Total Material / Total Parts	140
Tax	5.60
TOTAL	$313.60

Written by Skip

I hereby authorize the above repair work to be done along with the necessary material, and hereby grant you and/or your employees permission to operate the car, truck or vehicle herein described on streets, highways or elsewhere for the purpose of testing and/or inspection. An express mechanic's lien is hereby acknowledged on above car, truck or vehicle to secure the amount of repairs thereto. Not responsible for loss or damage to cars or articles left in cars in case of fire, theft or any other cause beyond our control.

OK'd by Skip

Signed Eugene Bowers

During this conversation, which Powers secretly recorded, Powers and Saunders described the accident and their injuries, said the police offered to call an ambulance, and specifically indicated the areas of pain; when Petitioner told Powers he did not "look sick" and asked if he really was, Powers replied "not really." (Portions of this and other recordings are reproduced in the Minnesota Court's opinion in the Appendix.) A retainer agreement and medical information release forms were executed.

Because Petitioner had heard of complaints in the past by insurance companies about Dr. Coifman's billings and use of hypnotherapy, he twice called the medical society to inquire of the doctor's status. Although the medical society office had complaints on file, they agreed (at the request of the police) to lie to Petitioner and tell him the doctor was in good standing and to postpone their investigation of Dr. Coifman pending the scheme's completion.

Petitioner sent a letter of retention on July 10 to the insurance companies ostensibly covering Powers and the other driver. Of course Powers lied about this, too; but the insurance companies were also part of the police scheme, having agreed to deceive Petitioner into believing they did carry coverage. Later they agreed to settle the case without the usual adversary investigation and negotiations. Petitioner told Powers's insurance company to deal directly with Powers.

In August Powers was hospitalized for 10 days, where he was thoroughly examined and treated not only by Coifman, but by another totally independent physician, (Engel), who was not part of the police scheme. Actually Powers had a genuine pre-existing back injury, but concealed this from Coifman, Engel and Petitioner. Reports from the two doctors, reproduced below, as well as several billings for treatment, were given to Petitioner. Coifman's letter to Petitioner was as follows:

3-D

ROBERT E. COIFMAN, M.D.
2545 Chicago Avenue, Suite 305
Minneapolis, Mn. 55404

Tel. (612) 874-5660; 871-9311

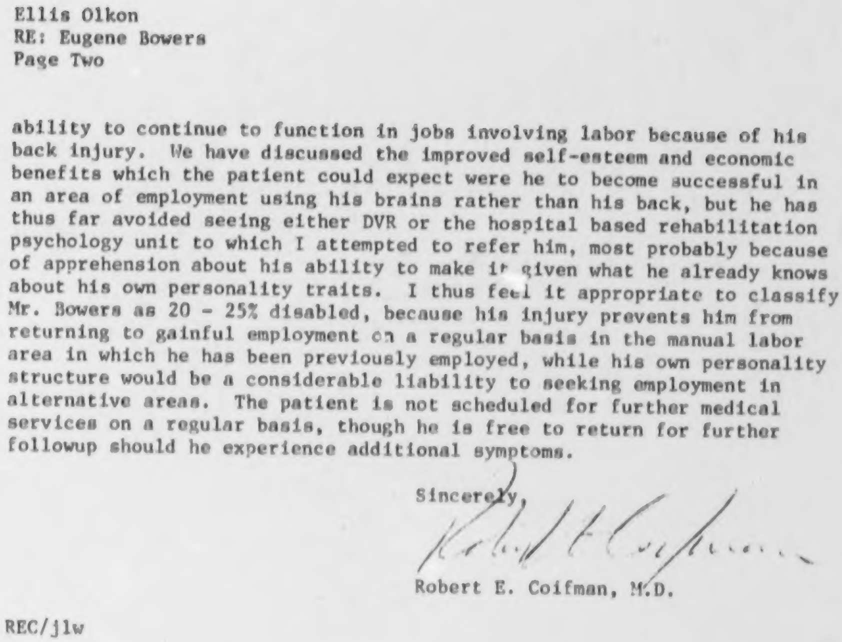
December 14, 1978

Ellis Olkon, Attorney at Law
2226 IDS Bldg.
Minneapolis, MN 55402

RE: Eugene Bowers
Date of Birth: 5 September, 1942
Our medical record #1039-00-07

Dear Mr. Olkon,

I am writing to summarize the history, clinical course, and residual disability of this 35-year-old white male, reporting himself to have been in generally good health and employed for 5 of the 6 years preceding his injury in occupations involving heavy manual labor. On 16 June, 1978 he was driving a van with a high seat back (functioning as a head rest), standing at a traffic signal when he was rear-ended by a full-sized car. He experienced general shaking up with no immediate localizing symptoms, though on examination approximately 12 hours later he already had localizing back and neck sprain findings. It initially appeared that the patient stabilized on an outpatient management program consisting of exercises, relaxed swimming for limbering and strengthening, anti-inflammatory and muscle relaxant drugs, and hypnotherapy for general and specific muscle relaxation and for specific turning off of pain. Because of a deteriorating clinical course he was hospitalized in mid-August for a total of 9 days, during which time intensive physical therapy, rest, more regular drug therapy, plus further instruction in self-hypnosis were successful in reversing his clinical course and permitting a return to essentially normal activities as long as he would avoid heavy labor and heavy lifting. The patient's subsequent course has been characterized by continuing general stability except for recurrence of symptoms with heavy lifting, and to a somewhat lesser extent with cold weather. He takes no medications at the present time on a regular basis, though has experienced numerous low grade flairs in his symptomatology. One would ordinarily think that a fairly bright young man such as this would have little difficulty moving into employment in an area not involving heavy manual labor, but Mr. Bowers appears to have a character or behavior disorder which makes it difficult for him to get along in close working situations, and his employment, while more or less continuous prior to the accident, has still involved frequent job changes and been most stable when he has been working by himself. I do not feel his prognosis is good for making an adjustment to employment in areas in which he has always had a poor track record, without antecedent or concurrent major counseling and psychiatric intervention of a type for which the patient experiences no motivation to undertake, with the anticipated result that he will continue to seek episodic employment in his previous work areas though with less



Ellis Olkon
RE: Eugene Bowers
Page Two

ability to continue to function in jobs involving labor because of his back injury. We have discussed the improved self-esteem and economic benefits which the patient could expect were he to become successful in an area of employment using his brains rather than his back, but he has thus far avoided seeing either DVR or the hospital based rehabilitation psychology unit to which I attempted to refer him, most probably because of apprehension about his ability to make it given what he already knows about his own personality traits. I thus feel it appropriate to classify Mr. Bowers as 20 - 25% disabled, because his injury prevents him from returning to gainful employment on a regular basis in the manual labor area in which he has been previously employed, while his own personality structure would be a considerable liability to seeking employment in alternative areas. The patient is not scheduled for further medical services on a regular basis, though he is free to return for further followup should he experience additional symptoms.

Sincerely,

Robert E. Coifman, M.D.

REC/jlw

Note that in addition to describing Powers's physical injuries, Coifman reports that Powers "appears to have a character disorder" and is in need of "major counseling and psychiatric intervention" for which he had been referred to, but refused to consult, rehabilitation and psychology services.

The hospital reports and billings supporting Dr. Coifman's diagnosis are found in the Appendix.

In addition to the report of Coifman, about whom Petitioner had expressed some reservations, and the supporting medical records, Petitioner received the following report from Dr. J. P. Engel:

CONSULTATION

Patient's Name Eugene Bowers Address

Date 8-21-78 Hospital No. Room No.

Attending Physician Consultant

Complains of a right sided lower back pain of not a severe extent and this is a symptoms that comes on as he changes his position and when he gets up and then stands up from the sittigg position he has the pain momentarily which causes him to stop and then he is able to stand erect.

There has been a back ache in the past with increased physical activity and no sharper pain of this nature.He had also a complaint of some mild soreness of his neck on the turning of his head and side bending to the left/

States that physical therapy is easing this symptom

Got the problem post having been the driver of his car stopped in traffic and then hit from rear and jarred causing about $700 damage to the van.

The first xray studies were done at M.MC on an outpatient basis

The symptoms continue to thepresent time

The exam shows that his weight is at 180 pounds and the height is at 6 feet and he has a normal appearance and the only physical problem appears to be the complaints of pain on the various movements done

The exam shows that he stood up in a natural manner from his seated position on his bed.There was a backward tilting of his back at 15 degrees and this was painful and he had a better right than the left side bending and the stretch of his right side of his lower back interfered with the full side bending to his left but the range was quite good .There was a foreward bending of 60 degrees and he had some flattening of his lower back on thismovement but stated that this did not hurt his lower back

The passive thigh bending went supine position to 45 degrees and this was taken better on his left side.The straight leg raising range of 5 5 d pulled on his lower back the right side and the left side test was at 65 degrees .The reflexes were active

Had spasm of his lower backmore on his right side and more tenderness over his right lumbosacralregion .Thespasm was at grade two .

He had mild spasm of his left side upper spine involving the C5-6 region

Diagnosis is lumbar spine sprain with a mild right sided radiculitis and a cervical spine sprain of a milder extent/

Needs most of all a training program in the body mechanics and the kind of exercise to do for control of the stability of his lower back/

Will discuss with the physical therapydepartment and with him on the subsequent visits/

J.P.Engel M.D. 8- 21- 78

CONSULTATION

BOWERS EUGENE -- A321-1
570025-3 8 15-78
DR R COFFMAN 9-25-42 35
472 48-49-07

Note that this report confirms a back and neck injury consistent with Powers's description, the accident report, the hospital records and Coifman's report. (This report was not presented to the grand jury that indicted Petitioner. See Section 8 of the opinion below, Appendix.)

Petitioner forwarded these reports to the insurance companies, whose representatives (in collusion with the police) then called Petitioner, and settlements were easily arranged since Powers had been urging Petitioner to make a quick settlement. In the conversations leading up to the settlement there were a number of remarks by Powers and Petitioner about the genuineness of Power's injuries; throughout, Powers made ambiguous and inconsistent claims that he was and was not injured, that he had "fooled" all the doctors, that the case was and was not "phony." Petitioner, for his part, expressed skepticism about Coifman, recommended patience rather than prompt settlement so that permanency of the injuries could be determined, said he would withdraw from the case if it were phony, and told Powers the insurance companies would do their own investigation. There was discussion about whether the claim was legitimate and what would happen if it were not. Since the conversations are contained in the Minnesota Court's opinion, and space is limited, we do not reproduce them here. But we emphasize certain important facts *not* in the conversations: at no time did Powers say that he was not actually in a serious accident (and the police report and repair bill proved that he was), and at no time did he reveal his actual pre-existing back injury. Powers admitted that he made his statements to Petitioner intentionally ambiguous.

This prosecution was based upon Petitioner's submission of the insurance claims, on the theory that because Powers had made remarks to the effect he was not injured the claims were knowingly false, despite Powers's and Saunders's statements to the contrary, and despite the accident and medical reports showing extensive property damage, personal injury and mental instability.

In the Court below Petitioner asserted pre-trial the defense that he was entrapped in violation of the Fifth Amendment; under Minnesota law this issue was submitted to and decided before selection of the jury by the trial judge who found that "the defendant was not entrapped." (See Order, August 16, 1979, Appendix.) *State v. Grilli,* 304 Minn. 80, 230 NW2d 445 (1975) establishes the Minnesota procedure. The question was then raised on appeal and rejected by the majority of six, with Justices Yetka and Wahl dissenting at length. (Appendix.)

Among the other issues raised in the Minnesota courts, which have a bearing upon the context of the entrapment and due process claims were: 1) the prosecution did not present exculpatory evidence to the grand jury, specifically the report from the disinterested Dr. Engel; 2) extensive evidence of misconduct by Coifman and Neff, not related to petitioner, was presented to the grand jury; and 3) despite evidence from several sources that anti-semitic remarks and other prejudicial conduct were made by trial jurors, at a post-trial hearing the trial judge questioned only six of the jurors about this, and restricted inquiry into the misconduct over defense objection. (See Sections 8 and 11 of the Minnesota Court's opinion, Appendix.)

ARGUMENT

I.

This Case Presents Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court: The Constitutional Implications of and Restraints on Prosecution for Police-Created, Police-Controlled Non-Contraband Offenses Where the Idea is Implanted By The Police in a Person Not Suspected of Wrongdoing Who is Enticed Into the Alleged Offense By Elaborate Deception Including Falsified and Genuine Official Documents and Information Persuasively Showing the Conduct Solicited is Not Illegal.

This case has two very important factors not found in this Court's previous decisions involving the defenses of entrapment and denial of due process by police overinvolvement. First: it is a non-contraband offense. Second: the police deceptions were calculated to convince the defendant the conduct in question was *not* unlawful.

In its most recent pertinent decision this Court noted that it has not "had occasion yet to confront" the immensely consequential issues vividly drawn in this case: The Constitutional implications and judicial control of "Government overinvolvement in areas outside the realm of contraband offenses." *Hampton v. U.S.*, 425 U.S. 484, 493 (1976), Justice Powell concurring. It is important both to law enforcement and criminal defendants that the Court undertake the inquiry now, at a time of increasingly active "creative" police practices involving agents posing as would-be solicitors of bribes and spawners of frauds, often equipped (as in the present case) with sophisticated electronic devices and falsified official documentation.

Although we believe the present conviction is Constitutionally invalid under the established "subjective" criteria of "entrapment," where "the Government's deception actually implants the criminal design," as the police indisputably did here, *Hampton v. U.S.*, 425 U.S. at 489, quoting *U.S. v. Russell,* 411 U.S. 423, 436 (1973), this record permits us to broaden the inquiry to include application of the Due Process clause to the degree of police involvement in non-contraband offenses, where a congeries of government and private agencies and persons collaborate to provide the defendant with extensive falsified and authentic evidence, documentary and oral, tending forcefully to assure the defendant that the acts he was induced to undertake were *not* improper. For this is not a case, like those in the leading quartet of *Hampton v. U.S., supra, U.S. v. Russell, supra, Sorrells v. U.S.*, 287 U.S. 435 (1932), and *Sherman v. U.S.*, 356 U.S. 369 (1958), where the nature of the contraband involved excluded any doubt about the defendant's knowledge of the illegality of the transaction and no representations of legality were made by the police; here the police affirmatively persuaded the defendant that the *agent provacateur* was *not* acting fraudulently, despite his ambiguous suggestions to the contrary.

Whether we speak of "entrapment" or "Due Process," it can hardly be gainsaid that we are here in a different realm of jurisprudence (from the contraband cases) when *these* factors come into play:

1. The defendant is not previously suspected of wrongdoing. but of good reputation for honesty and public service, as attested by numerous character witnesses from the bench, bar, and clergy, targeted by chance,[3] and involved solely by the police-agent's solicitation.

2. The defendant is a lawyer, bound to act zealously in the best interests of his clients.

3. The counterfeit client tells the defendant and his staff that his back was injured; he later makes deliberately ambiguous statements to the contrary, but *never* denies that the accident actually took place.

4. The existence of the injury is confirmed by:
    - A. The client's physical appearance, including a conspicuous neck brace and an awkward walk.
    - B. The client's companion's assertions that she, too, was injured.
    - C. The official police report showing a serious accident, and the agent's statement that the police inquired if they should call an ambulance.
    - D. The medical report of Dr. Coifman, showing physical injury and mental problems.
    - E. The actual lengthy hospitalization of the agent, during which he was treated for the injuries.
    - F. The report of Dr. Engel, an independent and disinterested doctor not part of the police collusion, confirming the injuries.
    - G. The fact the agent actually had a pre-existing back injury, but concealed it.
    - H. The repair bill for the vehicle.
    - I. The hospital bills and reports.

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[3] The agent had first been given another lawyer's name, but did not pursue that because the agent thought that lawyer would rcognize him. See Footnote (1) of the Minnesota Supreme Court's opinion in the appendix.

5. The client's competence and ability to say he was not injured are undercut by the doctor's report of a mental disorder requiring psychiatric intervention.

6. The legitimacy of Dr. Coifman is confirmed to the defendant by the police-sponsored deceptions of the Medical Society, which stated Dr. Coifman was in good standing.

7. The insurance companies assist in the deception, rather than acting as vigorous adversaries as the defendant would expect, by:

   A. Providing false insurance policies.

   B. Accepting claims without investigation, resistance and with only minimal negotiation.

8. The agent is provided false official identification documents.

9. The agent urges the defendant to resolve the claim quickly.

10. It is impossible that any crime could have been consummated, the scheme being entirely police-created and police-controlled.

Thus answers to the two traditional "entrapment" questions dictate a result in the defendant's favor:

1. Was the idea implanted by the police? Yes.

2. Was the defendant proved to be predisposed to do the crime? No. And the more difficult and comprehensive questions under the Due Process doctrine yield similar answers:

May the police create a non-contraband "crime" from whole cloth, entice an unsuspected citizen into it, raise the citizen's scruples by ambiguous suggestions of impropriaty, overcome those scruples by elaborate, extensive and convincing false and genuine evidence, and then prosecute that citizen for accepting the police deceptions at face value?

Where , in traditional "entrapment" cases, the police provide narcotics, or buy stolen property, or offer a bribe, the suspect knows unequivocally his solicited acts will be unlawful; even so the law protects him if the police implant the criminal idea. Should that salutary protection be denied one to whom the police go much farther and provide substantial evidence to convince the suspect that *no illegality is involved?* And: Will this practice of using dissembling clients encourage lawyers to fulfil their duties to make zealous counsel available to all litigants (as opposed to a self-protecting and even cowardly refusal to represent confused, difficult and unpopular clients)?

Dissenting Justices Yetka and Wahl[4] would have held petitioner was entrapped as a matter of law, for reasons we find inescapably persuasive:

> The police had no information nor any suspicion that Olkon was involved in any fraud schemes. . . . Thus, the police had no rational justification for setting a trap for Olkon.
>
> Olkon received both a police report indicating that an automobile accident had occurred and medical reports indicating that Powers was injured. Some of the medical reports were from Dr. Coifman. However, Olkon also received a report verifying the injury from Dr. Engel, a physician totally independent of Dr. Coifman and beyond any suspicion.

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[4] Coincidentally Judge Douglas Amdahl, who presided at petitioner's trial and ruled against petitioner on the entrapment issue, had been elevated to the Minnesota Supreme Court but did not participate in this decsiion.

Of course, Powers told Olkon he had fooled the doctors. Olkon had good reason to disbelieve this assertion due to the medical reports themselves, Powers' highly unusual behavior, and a medical report indicating that Powers had a character or personality disorder. It is also relevant here that Powers never denied that the accident had occurred. Olkon believed Powers was a "macho" type trying to downplay his injuries.

Moreover, Powers had not really fooled the doctors at all. Powers had previously suffered a real back injury. He disclosed this fact neither to his doctors nor Olkon. Thus, in reality, Powers had not fooled the doctors; the doctors' reports were correct and Olkon was justified in relying on them. . . .

. . . .

. . . As the majority notes, the key issue is whether the prosecution proved beyond a reasonable doubt that Olkon knew the insurance claim was false. First, however, it must be decided whether the claim was totally false. The insurance claim made essentially two assertions: (a) that Powers had a back injury; and (b) that the injury was caused by the accident in question. As noted previously, assertion (a) was *true* because Powers did in fact have a back injury which was properly diagnosed by the doctors. Assertion (b) was false because the back injury was preexisting. However, Powers never disclosed this to Olkon or to the doctors. Thus, there is no way Olkon can be charged with knowledge of the falsity of assertion (b) so the intent element is simply nonexistent.

Even disregarding the pre-existing back injury, Olkon cannot be charged with intent to file a false claim . . . Olkon was justified in relying on the two independent medical reports. Although Powers tried to downplay his injuries, Olkon knew Powers had

> psychological problems and felt that he was trying to prove his toughness. Olkon was never given reason to doubt that the accident had occurred. Thus, even if the actual existence of the back injury is ignored, Olkon was justified in believing the claim to be proper.
>
> . . . .
>
> . . . Unless a lawyer knows that the client's factual statements are false, his duty is to advocate the client's position zealously. The attorney is not required to make an independent investigation of his client's veracity in an effort to impeach him; that is the duty of the other parties in an adversary system. The insurance companies could have investigated the case and had further medical examinations taken. Unfortunately, the protections of the adversary system were wholly lacking since the insurance companies were in collusion with the police. The insurers never questioned the early medical reports and never indicated any doubt as to the claim.

I do not believe that the defendant would ever have been prosecuted were he not a lawyer. The evidence of guilt is simply too flimsy and ambiguous. I believe the prosecution felt compelled to prosecute him out of fear of possible public censure that it was deliberately being easy on a member of the legal profession.

I also believe we should now overrule *Grilli* and adopt the objective test. The objective test, as formulated in the American Law Institute, *Model Penal Code* § 2.13(1) (Proposed Official Draft 1962), provides:

> A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he

> induces or encourages another person to engage in conduct constituting such offense by * * *:
>
> * * * *
>
> (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

This test deals squarely with the problem of this case: the fact that many attorneys, not out to commit fraud but to serve their clients diligently, would file a claim if presented with the tactics used and facts of this case. If that is so, then the police have not proven that Olkon is more guilty than other innocent persons. This court should not stand by and allow police to use tactics which do not separate the guilty from the innocent.

. . . .

I propose that we now adopt this test. Since the tactics used by the police under the facts of this case created a substantial risk that innocent persons would have been trapped, I would hold that the defendant has made out the defense in this case.

One of the vices of entrapment is that the police must themselves break the law to catch supposed criminals. The illegalities in this case include issuing a false driver's license, issuing a false welfare card, writing a phony accident report, issuing a phony receipt for a copy of the report, and writing a false auto repair bill. We know from *United States v. Nixon*, 418 U.S. 683 (1974), that even the President of the United States is not above the law. Where is the authority in the Constitutions of the United States or the State of Minnesota or by statute which permits the police in this state to break the law in order to enforce the law? There is the ancient common law rule of fresh pursuit of a lawbreaker, but that is inapplicable to this case. We are not a police state *yet*.

Entrapment is not even a necessary technique as to this kind of crime. Doctors, lawyers and insurance companies all keep thorough records on cases. If the police had reason to suspect Coifman or Olkon, they could have used their investigatory skills and powers to find and solve any crimes which had been committed rather than creating new crimes and committing crimes themselves in the process.

The Illinois Supreme Court in *Horwitz*[5] stated:

> For the lawyer in active practice real temptations are plentiful and sufficient without their artificial multiplication by private parties whose real motives can with certainty be known only to themselves. The lawyer must deal with exaggerations, fraud, and actual perjury day after day, and occasionally these things come from his own clients without his knowledge or consent. His path is hazardous at best, and if he can so far avoid its natural pitfalls as to maintain and be able to prove a good reputation, it should be sufficient to protect him against plots and schemes.

We, of course, agree with this analysis. For purposes of this petition, however, and the Court's decision whether to review the matter, it is sufficient that answers and guidance are urgently needed, and it is unlikely that another record raising the questions so dramatically will soon come to the Court's attention.

II.

The Minnesota Supreme Court's Rationale is in Conflict with Constitutional Decisions of this Court and Other Courts.

It can scarcely be doubted that the Minnesota court's opinion so drastically emasculates the entrapment and due process defenses as to destroy them altogether, and makes citizens fair game for conviction of police-created and non-existent offenses. In its earlier and leading case, *State v. Grilli,* 304 Minn. 80, 230 NW2d 445 (1975), the court had adopted the "subjective" test, focusing on the defendant's predisposition: "whether it was his original intent to commit the crime charged." 304 Minn. at 89, 230 NW2d at 452. The factors to consider in answering this inquiry were said to be

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[5] *In re Horwitz*, 360 Ill. 313, 196 NE2d 208, at 214 (1935).

> (a) defendant's active solicitation to commit the crime, (b) prior criminal convictions, or (c) prior criminal activity not resulting in conviction. . . ., or (d) defendant's criminal reputation. 304 Minn. at 89, 230 NW2d at 452.

None of these factors was present in this case; rather the court looked to a catch-all dictum in the *Grilli* decision to the effect that if "by any other adequate means the challenged conduct of the state's officers is mitigated or excused," Ibid, entrapment is not proved.

First, we note that this catch-all, by focusing on justification of the police conduct, confusingly shifts from the "subjective" to the "objective" approach to entrapment, contrary to the court's expressed adoption of the former. Then, in affirming the conviction under this vague "objective" standard, the court even more confusingly applies it to the "subjective" question: "whether the defendant's predisposition was shown by *other adequate means," State v. Olkon,* appendix, (emphasis in original), and found that it was.

The dissenters disagreed, saying:

> . . . There is no evidence whatsoever that Olkon was predisposed to commit this crime. The *Grilli* case stated four specific ways of proving predisposi-

tion, but not one of them is true here. . . (Appendix.)

. . . .

In *Grilli,* we quoted with approval the following from *Newman v. United States,* 299 F. 128, 131 (4th Cir. 1924):

> When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

Since the criminal design here originated with the police and Olkon was lured by numerous deceitful acts into filing the insurance claim, he has a valid entrapment defense even under the subjective test.

In a case with strikingly similar facts, the Illinois Supreme Court held that the attorney had been entrapped under the "subjective" test. *In re Horwitz,* 360 Ill. 313, 196 N.E. 208 (1935). In that case, as here, the detective had created a fictitious accident but never told the attorney it had not occurred. The detective also had a pre-existing back injury but never disclosed it. The medical reports verified the injury but the detective, when concealed witnesses were listening, made statements such as "You know I am not injured." The Illinois court concluded:

> If this entire record is interpreted most strongly against the respondent, it falls short of sufficient ground for disbarment. He was entrapped by a set of false and carefully arranged circumstances and evidence sufficiently valid, and apparently real, to deceive an experienced practitioner.

360 Ill. 313, 196 N.E. at 213. Although that case was a disciplinary case, it is even less proper to

> convict such an attorney of a crime because of the higher standard of proof and the necessity of proving intent....
>
> The objective test is supported by many of the United States Supreme Court justices in their various concurring and dissenting opinions. The states are clearly free to adopt a stricter test than the federal rule, and many states have done so. In addition to the five state courts which had adopted the objective test noted in *Grilli,* another eleven states have now adopted the objective test by statute. The objective test is also supported by the overwhelming majority of scholarly writing on the subject. [Footnotes omitted.]

The majority opinion below is irreconcilable with this Court's decisions, despite the Minnesota court's lip-service to them. Summary reversal for entry of judgment of acquittal under those cases would be an appropriate disposition. The dissent not only states the present case correctly and indicates the proper result, but (the important point for purposes of this petition) underscores the conflict and confusion in this surpassingly important area and the need for guidance from this Court. Indeed it is fair to suggest that there is perhaps no comparably important aspect of the criminal and constitutional law in which uncertainty, disagreement and potential for injustice are so great.[6]

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[6] See, for collections of decisions demonstrating the diversity of approaches in non-contraband entrapment and due process cases, e.g.: Anno., *Larceny: Entrapment or Consent,* 10 A.L.R.3d 1121; Anno., *Defense of Entrapment in Contempt Proceedings,* 41 A.L.R.3d 418; Anno., *Instructing on Burden of Proof as to Defense of Entrapment in Federal Criminal Case,* 28 A.L.R.F2d 767; Anno., *Propriety and Prejudicial Effect in Federal Criminal Case of Instruction Distinguishing "Lawful" and "Unlawful" Entrapment,* 39 A.L.R.F2d 751; Anno., *Entrapment to Commit Offense Against Obscenity Laws,* 77 A.L.R. 2d 792; Anno., *Entrapment with Respect to Violation of Fish and Game Laws,* 75 A.L.R.2d 709; Anno., *Entrapment to Commit Brib-*

Another illustrative non-contraband case paralleling the present one, (though decided on other grounds), and inspiring in Judge Friendly sentiments toward government creativity which we respectfully believe should in part guide this Court's approach to the issue, is *United States v. Archer,* 486 F.2d 670 (2nd Cir. 1973). To combat corruption in the Queens, New York, criminal justice system, state and federal officials had a disguised agent pose as an illegal possessor of firearms who was duly arrested and asked a lawyer and bondsman (both previously unsuspected, like this petitioner) to prevent an indictment. As here, the agent was provided false identification[7] and false police reports were generated.[8] The private lawyer contacted an assistant district attorney (Archer), who advised him to fabricate an explanation for possession of the firearms; this was done, with Archer presenting the case, lying to the grand jury, and as a result a no-bill was returned. The principals were indicted for violation of the Travel Act.[9] The Second Circuit court reversed the conviction on the narrow ground that the basis for a federal offense cannot be created by interstate

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ery or Offer to Bribe, 69 A.L.R.2d 1397; Anno., *Entrapment to Commit Offense Against Laws Regulating Sales of Liquor,* 55 A.L.R. 2d 1322; Anno., *Entrapment to Commit or Attempt Abortion,* 53 A.L.R.2d 1156; Anno., *Entrapment to Commit Sexual Offense,* 52 A.L.R.2d 1198; Anno., *Entrapment to Commit Crime with Respect to Gambling or Lotteries,* 31 A.L.R.2d 1212; Annos., *Entrapment to Commit Crime with View to Prosecution Therefor,* 18 A.L.R. 146, 66 A.L.R. 478, 86 A.L.R. 263.

[7] Including, as here, a driver's license; he was also given a false immigration card and—parallel to the collusion of the Medical Society in the present case—the Immigration and Naturalization service agreed to provide false information from its office as well. 486 F2d at 672-673.

[8] In *Archer* the arresting police were not part of the scheme, so although the arrest was false the police reports themselves were not wholly fabricated as here.

[9] 18 U.S.C. § 1952. prohibiting interstate and foreign travel or transportation in aid of racketeering enterprises.

telephone calls deliberately generated by law enforcement officials for that purpose.[10] 486 F2d at 681-683.

Judge Friendly's analysis begins, however, with an incisive critique of the government's ignoble role in manufacturing the crime itself, a role necessarily based on a belief that the end justifies the means:

> Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality. 486 F2d at 677.[11]

As a recent commentator has observed, this Court has not established a clear majority position on the subjective-objective dichotomy, even in contraband entrapment cases.[12] Though *Archer, supra,* was decided before *Hampton, supra,* the latter was a plurality decision so far as pertinent and, unlike *Archer, Hampton* was a contraband case. Indeed Mr. Justice Powell's concurrence in *Hampton* cites *Archer* as an example of the type of non-contraband situation this Court has not addressed. 425 U.S. at 493.

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[10] The Court also condemned federal intervention into what, but for that intervention, would be a purely state or local matter, an issue not involved in the present case.

[11] Eariler Judge Friendly quoted Mr. Justice Brandeis's famous dissent in *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928), which says in part:

> To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. 486 F2d at 675.

[12] R. Scott Long, *Entrapment - A Due Process Defense - What Process is Due?* p. 11, Southwestern University Law Rev. 663 (1979). There are a number of other helpful recent commentaries on the subject, e.g.: Tanford, *Entrapments Guidelines for Counsel and the Courts,* 13 Crim.L.Bull. 5 (1977); Note, *Rejection of the Conduit Theory of Entrapment, Hampton v. United States,* 425 U.S. 484 (1976), 8 Tol.L. Rev. 473 (1977); Note, *Criminal Procedure - The Entrapment Defense - A Reexamination,* 25 Mercer L.Rev. 957 (1974); Comment, *Elevation of Entrapment to a Constitutional Defense,* 7 U.Mich.J.L. Rev. 361 (1974). DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application.* 1 U.S.F.L.Rev. 243 (1967). Park, *The Entrapment Controversy,* 60 Minn.L.Rev. 163 (1976). Comment, *Entrapment: A Critical Discussion,* 37 Mo.L.Rev. 633 (1972); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs,* 60 Yale L.J. 1091 (1951).

The great confusion, inconsistency and disparity in the handling of the issues both in federal and state courts, is, of course, one of the most important reasons for this Court's exercise of its certiorari jurisdiction. Rule 17 (1) (a), *Rules, United States Supreme Court.*

Another troubling and unusual aspect of this case is that the defendant is a lawyer, solicited into the police scheme for that very reason. While it may be true that lawyers as such should have no particular protection from creative law-enforcement, and may even be held to higher standards than laymen for certain purposes, it is important to remember that lawyers often (and certainly in personal injury litigation such as is involved here) operate in and as part of an *adversary* system, owing undivided loyalty to each client's interests, leaving it to the adverse party and adverse counsel to expose and exploit defects in the plaintiff's case. Whether or not a party was actually injured and the source and extent of injuries are questions ideally and routinely resolved in the adversary system, and it is not the task (not even the right) of a claimant's lawyer to defeat the claim, even upon the claimant's statements, at least when as here substantial believable evidence supports the claim. As Justice Yetka's dissent correctly noted, even after the counterfeit client's disclaimers to petitioner there remained substantial reliable evidence of an actual accident and injury (there *was* an actual, earlier injury) and the claimant's suggestions to the contrary were vitiated by the evidence of his mental instability. For petitioner to pursue the claim here was very little if any different from a lawyer vigorously defending and seeking acquittal of a criminal defendant who has admitted guilt; at least the Minnesota court's rationale would not need much stretching to encompass that situation. If ethical questions arise in such cases they should be treated as ethical questions, not made the basis of criminal prosecution, lest the essential duty of zealous advocacy be chilled and defeated.

We note incidentally that from a lawyer's point of view in these circumstances an absolute refusal to deal with a client who suggests he may be attempting a fraud could be expected not to defeat that attempt but merely to educate the client to go to other counsel and not suggest his duplicity, which would supposedly increase the chance of the fraud succeeding. While this would not provide a defense as such, it remains obvious that had the insurance companies or the Medical Society done their jobs in these circumstances, and exposed the questionable nature of the claim rather than confirming its legitimacy, the defendant lawyer would have been in a position to abort the scheme without enabling the client to begin it anew elsewhere, and it is clear from this record that this defendant would undoubtedly have done so. A lawyer can no more be required to reject out of hand a client's unsupported claim he is not injured, in the face of convincing evidence to the contrary, than a lawyer could be required to believe a criminal defendant's claim of guilt or innocence, in the face of evidence and law to the contrary.

Therefore the fact that petitioner is a lawyer does not militate against him, as the Minnesota majority suggests, but in itself goes far toward justifying, even arguably requiring, his conduct.

CONCLUSION

The present case is a uniquely appropriate one to bring before this Court the supremely important unanswered questions involved in applying the doctrines of entrapment and due process to non-contraband crimes which are created by the government and implanted in the defendant's mind. In addition the present case has the especially troublesome element of the government's use of false and authentic documents and information tending to show that the acts solicited were *not* illegal at all, thus most unfairly lulling the defendant into a belief of its legitimacy and disarming his scruples or reservations.

Condemnation of police creativity on this scale will have no adverse effect on legitimate law-enforcement investigative techniques against crimes difficult of detection; contraband investigations would not be affected at all, nor would non-contraband investigations where a suspected and predisposed wrongdoer is merely provided an opportunity to carry out a crime of his own design. Infiltration of organized crime, apprehension of white-collar offenders by disguised agents, and such techniques as the so-called "sting" method of ensnaring property offenders would remain perfectly viable; indeed law enforcement resources, always too limited, would be much more wisely allocated to such undertakings than to the creation of fictional schemes for the enlistment of otherwise unexceptionable citizens.

A writ of certiorari should issue to allow this Court to address these important and undecided issues, and to resolve the conflicts between courts, as well as to correct the injustice of this conviction.

Respectfully submitted,

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APPENDIX

No. 315 Hennepin County

Todd, J. Dissenting, Yetka, J., Wahl, J. Took no part, Amdahl, J.

STATE OF MINNESOTA,

Respondent,

50966 vs.

ELLIS OLKON

Appellant.

Endorsed
Filed August 29, 1980
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

1. Defendant's argument that the prosecution engaged in misconduct which denied defendant a fair trial is rejected.

2. The trial court did not err in admitting into evidence the tape recordings of communications between defendant and an undercover police officer which were obtained without a warrant but which were consented to by the police officer.

3. The trial court did not abuse its discretion by permitting the jury, while listening to the recorded conversations between defendant and the undercover police officer, to refer to transcripts of those recordings.

4. There was no inconsistency in the jury verdict for which a new trial is required.

5. Defendant was properly indicted on two counts of attempted theft and two counts of conspiracy.

6. The trial court adequately instructed the jury on the issue of reasonable doubt.

7. The trial court did not err in accepting a partial jury verdict.

8. No prosecutorial misconduct occurred during the grand jury proceedings which required a dismissal of the indictment against defendant.

9. There was sufficient evidence for the jury to find beyond a reasonable doubt that defendant committed the crimes of attempted theft by swindle.

10. The trial court did not err in dismissing the defense of entrapment.

11. The trial court did not abuse its discretion in determining to call only six jurors to testify at the "Schwartz" hearing or in limiting the scope of inquiry at those proceedings.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

TODD, Justice.

Defendant, Ellis Olkon, was charged with two counts of conspiracy to commit theft by swindle over $2,500 and two counts of attempted theft by swindle over $2,500. These charges were brought after defendant Olkon collected monies from two insurance companies for the purported automobile accident injuries of a client even though he was apprised that the client was not in fact injured.

The client, who unbeknown to defendant was an undercover police officer, had requested that defendant act as his attorney in presenting the false claims to the insurance companies. Prior to trial, defendant moved to dismiss the indictment on the ground that prosecutorial misconduct had occurred during the grand jury proceedings and on the ground that the indictment was multiplicious. These motions were denied. Defendant waived a jury trial on the defense of entrapment. Therefore, the defense was tried before the court at the omnibus hearing. The trial court determined that defendant was not entrapped into the commission of any offense. After a jury trial, the jury returned a verdict of guilty on the two counts of attempted theft by swindle but was unable to reach a verdict on the two counts of conspiracy. Subsequent to trial, a Schwartz hearing was held because there had been allegations of juror misconduct. Defendant moved for a new trial and, in the alternative, for a judgment of acquittal. These motions were denied and judgment was entered against defendant. We affirm.

In early 1978, Walter Powers, a Hennepin County police officer who worked often on undercover narcotics investigations, was requested by Hennepin County Detective John Meath to take part in an undercover investigation of medical fraud activities. As a part of this plan, Deputy Powers established a doctor-patient relationships with Dr. Robert Coifman, a medical fraud suspect, by consulting with Dr. Coifman on three occasions for Powers' purported allergy problems. Deputy Powers identified himself to Dr. Coifman as "Eugene Bowers", the cover name which Powers was to use throughout the investigation. During some of these visits, Powers-Bowers was accompanied by Deputy Sheriff Pamela Lavarre, who used the cover name of "Elizabeth Saunders" and who posed as the girl friend of Bowers.

On June 16, 1978, Powers-Bowers and Lavarre-Saunders went to Dr. Coifman's office and told Coifman that they had been in a car accident the night before. Powers-Bowers complained of lower back pain but did not receive any treatment during that visit or during his next visit to Dr. Coifman. Dr. Coifman and his business manager, Nathan Neff, discussed the possibility of therapy and the wearing of a neck brace with Powers-Bowers. On June 20, Powers-Bowers and Lavarre-Saunders returned to Dr. Coifman's office and only saw Neff, who referred them to defendant Olkon, a Minneapolis lawyer, for legal assistance.[1] The police department had not intended to investigate Olkon until Neff made this reference.

Prior to the June 16 visit with Dr. Coifman, Powers-Bowers was issued a driver's license and a Hennepin County welfare care in his fictitious name. With the cooperation of the Edina Police Department, a fictitious police accident report was prepared on a standard Department of Public Safety form. The report indicated that Bowers and Saunders, while driving in a 1977 Ford van, were rear ended by one Joseph Barnes at 1:10 a.m. on June 16, 1978, and that property damage of $700 and physical injuries resulted from the accident. Powers-Bowers was also listed, in his fictitious name, as the owner of the van involved in the accident and was given a falsified repair bill for the van in the amount of $313.60. State Farm Mutual Insurance Company, at the request of the Hennepin County Sheriff's Department, provided Bowers with insurance coverage which included personal injury protection. The Travelers Insurance Company, the insurer of Joseph Barnes, and State Farm were fully informed of the fictitious nature of the accident and of the investigation plan. The insurance companies were requested to settle without contest any claims made against them on behalf of Bowers. The Hennepin County Sheriff's Department also contacted the Hennepin County Medical Society and requested that they delay the filing of charges against Dr. Coifman for about 30 days.

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[1] Neff had first given Powers-Bowers and Lavarre-Saunders the name of a different attorney but Powers-Bowers did not go to see that attorney because he thought that the attorney might recognize him as a police officer. Therefore, he asked Neff for the name of another attorney and was referred to defendant.

On June 22, 1978, Powers-Bowers called defendant's office to make an appointment with defendant. The conversation which ensued and subsequent calls to and interviews in the Olkon office were tape recorded by Powers-Bowers by means of a small transmitter and receiver. Powers-Bowers spoke with Debra Juhl, defendant's paralegal secretary. He identified himself as Eugene Bowers and told her that he had been referred to Olkon by Nathan Neff, that he had been involved in a car accident, and that he and Saunders had been injured and were in treatment with Dr. Coifman. Juhl contacted Bowers later that day and gave Bowers an appointment to see defendant the following Monday. Powers-Bowers agreed to come unless he was admitted into the hospital in the interim.

On the afternoon of Monday, June 26, 1978, Powers-Bowers and Lavarre-Saunders went to defendant's law office. They were casually dressed and Powers-Bowers wore a neck brace or "soft-collar." They were met by Debra

Juhl who had them execute legal retainer agreements and medical release forms. Powers-Bowers gave Juhl a copy of the police accident report. Juhl testified at trial that Powers-Bowers moved stiffly, appeared to be in pain, and gave no indication that he was not an injured person.

Powers-Bowers and Lavarre-Saunders then went into defendant's office. They identified themselves to defendant as Powers and Saunders, indicated that they were cohabiting, and told defendant they were unemployed. They described the accident to defendant and gave him insurance information. Lavarre-Saunders indicated that she had pain in her shoulders and lower neck and had headaches. Powers-Bowers stated that he had lower back pain and would be hospitalized. They also discussed their treatment with Dr. Coifman and defendant expressed skepticism concerning Dr. Coifman because his bills were high and because he treated patient with hypnotherapy, a procedure not highly recommended by the medical profession. At this meeting, the following also transpired ("O" represents Olkon, "P" represents Powers-Bowers):

O: You don't look sick. But with Coifman on, anybody's sick. Is something really wrong with you?

P: Ah, well, not really. But they decided that I should ah—that I maybe I could get something out of it. So they said I should come and see ya.

O: Well, I don't want to know anything about that.

P: Then I won't tell you anything about that!

* * * *

O: Ah, what I am concerned about is because under no fault insurance, you need one of three things, in order to qualify for a—for a personal injury lawsuit. I—you have to lose at least 2 months from work, but that's not gonna be the case, as neither one of you were working at the time of the accident. Or—2—if you have ah, up to $4,000 worth of medical bills, or hospital medication bills, which if you see Coifman, won't be a problem. I mean, I, I, I've never met that guy, and I don't want to meet him, but, ah, I guess I don't want to look a gift horse in the mouth. Cause I'm unhappy with him, ya know. And the third thing is to have a permanent injury and that you'll probably have, cause Coifman finds permanent injury.

* * * *

O: You're hurting, in pain, possibly hospitalized.

P: Don't laugh.

After this meeting, defendant notified the Travelers Insurance Company that an accident had taken place and that a possible cause of action existed. Defendant also informed State Farm of the accident and indicated that State Farm should deal directly with their insured, Bowers. Defendant forwarded to the insurance companies the accident report and repair bill.

In March and early July 1978, Debra Juhl called the Hennepin County Medical Society and asked whether there were any complaints against Dr. Coifman regarding his overcharging for services. Juhl was informed that Dr. Coifman was a member in good standing of the society.

On August 15, 1978, Powers-Bowers was admitted to the Metropolitan Medical Center by Dr. Coifman. While there, Powers-Bowers underwent treatment for lower back pain. He was also examined by Dr. Joseph Engel, a consulting physiatrist who had no relationship to Dr. Coifman. As a result of this examination, Dr. Engel concluded that

Bowers had a minor spine sprain and nerve root irritation. His consultation report indicated his diagnosis:

> Diagnosis is lumbar spine sprain with a mild right sided radiculitis and a cervical spine block sprain of a milder extent.

Dr. Engel also reported to State Farm that Bowers had a mild lower back and neck condition but that it was too early to indicate any permanency. Defendant received and reviewed these reports and other reports from the medical center which delineated Powers-Bowers' treatment there.

Powers-Bowers' next contact with defendant was on September 1, 1978, when he visited defendant at his law office. Powers-Bowers questioned defendant concerning the possibility of an early settlement of the insurance claims and defendant stated that it was to early for a medical determination of permanency of any injuries. In addition, the following discussion occurred:

P: ***I'm just wondering how long—if you have any idea how long this has to go on. I'm getting kind of tired—ah—playing with [Coifman].

O: Well, it's only been two and a half months since you were involved in a severe accident. You know a case isn't worth anything for sometimes up until two years.

* * * *

P: Yeah, but, since, since then, now I've been in the hospital, and they—ah—thought that that'd be a good way to get the bills built up so we'd have a good claim.

* * * *

O: Well, you still have neck and lower back problems?

P: Well, you know—I—

O: I get nervous when you do change your tone, I can't get involved in that.

* * * *

O: ***We can try to speed it up, but cases aren't really worth a hell of a lot until they're*** have some age, because medical experts will tell you, you can't determine a permanent injury after a few months because one of these days they're going to have their own doctors examine you and they're going to say there's nothing wrong with you.

P: Yeah, but I had—I was in the hospital for 10 days and fooled everybody in the hospital—so—

O: Well, that's good, they'll have good medical reports, and good medical, ah ya know—but that's not still showing that you're not going to completely heal and have nothing wrong with you two years from now.

P: Yeah, but—

O: In order to get good money you have to be able to convince the insurance company there's a permanent injury.

P: Oh, I, I'm a good actor, I can convince them of that.

O: You have to convince their doctor of that.

P: I'll convince 'em.

P: Okay—ahh—how much—ah—trouble could I get in, if the insurance company catches on to this thing?

O: I don't know what trouble you can get in if there's nothing, you know—if—

P: Well—

O: Basically,—

P: The doctor says there's something wrong with me, and well—just—

O: Well, if there is something wrong with you—the doctor says there's something wrong with you, and you're bringing this claim against the insurance company, ah—you can't get in any trouble. But if in fact, there isn't anything wrong with you, and—ah—I wouldn't be handling this case—I really wouldn't cause that's what I said earlier, I, you know. What prior arrangements you have with Dr. Coifman or Nathan Neff I don't even want to know about it. I know there are certain problems going on down there, cause I've had a few—ah—of the files, I haven't—your the only case I've taken in the last four months out of there. Maybe you're the only patient they've got left,—I don't know, but—ah—

P: Well, may—

O: So let's say—let's put it this way—the only trouble you can get in, is the same trouble Coifman can get in—if this is a phony case, you're both in trouble, you know. But you're in just as much trouble as he's in. Ya know*** Ah ***

P: Well, who's gonna tell 'em though? Who's gonna say that it's a phony case, or if it isn't?

O: There's only one person—you.

P: Well—I ain't going to say—nothin.

O: And Coifman's not going to say anything.

P: No.

O: So then what's the problem?

P: And you ain't going to say nothin'—cause you can't say anything that I tell you, right?

O: It's strictly confidential—just like your priest.

P: Okay, you don't—you don't know nothing about that it's a phony case then—cause

O: No, but if I thought it was phony, I would withdraw from the case, but wouldn't give that as the reason, I would say *** ethical conflict.

P: Well, if—I mean—I haven't—I haven't

P: Okay, I haven't told you.

P: At this particular—

O: I have no reason to believe that it's a phony.

P: I haven't, I *** Okay, I haven't told you anything—as far as that it's not on the up-and-up, or anything as far as you and I are concerned, or anybody else.

* * * *

O: *** I'm sure there's be nothing in the reports—ahhm—well, you know I haven't had this type of problem before in a domestic situation—some lady was here the other day who is working and was getting some welfare, but she had, ah her boyfriend was thrown out of the house.

O: *** What I'm really getting at here, and I don't know Elizabeth Saunders, I supposed she's a possibility—that you throw her out of the house, or—ah—you break up and start seeing somebody else, and some emotional problems develop—ah—and she'll say—well, you leave me Gene and I'm going to go to—ah to—the medical association, and tell them that you have a phony case. There's a possibility—

P: Well, I don't think so, but that I'm not really worried about.

O: Okay—but other than you and Coifman, that would be the only other possibility.

P: Well—she—she's involved in it, I mean as far as that goes, just as much as anybody else.

* * * *

O: You know then they'll do it, but you know, my—you know—it's just that from the medical treatment standpoint just as long as I do nothing more than read medical reports, and ask you how you feel, I'm you know—comfortable. It's just that, ah.

P: Well, as far as you and I are concerned, I've got back pain, and still a little bit of neck pain and whatever, but—ah—I, I haven't told you anything about anything else.

* * * *

O: That's right. Sure—I'd say that by March we could be ready for that kind of settlement, without any difficulty. You know—with 5,000 clear to you. That would be—ah—you know—without any difficulty at all, because ah—I haven't seen what his recent medical bills *** there's no medical report, but I've got some imagination.

P: Well, I'm sure, I'm sure, that it's high, cause he's charged me for lots of calls.

O: Well, so—

P: Some of them I didn't even make.

* * * *

P: It might—it might be kinda hard to—for the other doctors to say that I got, or to agree with [Coifman] that—or if he says that I've got a 5 or 10% disability—if I ain't hurt, so.

On November 14, 1978, and December 11, 1978, Powers-Bowers called defendant on the telephone. He asked when the case could be settled and was informed by defendant that nothing could be done until defendant received a medical report from Dr. Coifman.

On December 15, 1978, Powers-Bowers went to defendant's office and hand delivered a medical report from Dr. Coifman to defendant. That medical report provided in part:

> Mr. Bowers appears to have a character or behavior disorder which makes it difficult for him to get along in close working situations, and his employment, while more or less continuous prior to the accident, has still involved frequent job changes and been most stable when he has been working by himself. I do not feel his prognosis is good for making an adjustment to employment in areas in which he has always had a poor track record, without antecedent or concurrent major counseling and psychiatric intervention of a type for which the patient experiences no motivation to undertake, *** I thus feel it appropriate to classify Mr. Bowers as 20-25% disabled, because his injury prevents him from returning to gainful employment on a regular basis in the manual labor area in which he has been previously employed, while his own personality structure would be a considerable liability to seeking employment in alternative areas. ***

The following conversation between Powers-Bowers and defendant ensued:

P: Good. That's what we're waiting for—right there.
O: From Coifman?

P: Yeah. He had me read it to make sure it was right before, he said too that if that's not exactly what you want, that he can redo it too.

* * * *

O: I don't like the report, it's the second time I've told Coifman, you know that, you, say 20 to 25 percent disabled, but they have to name the goddam part of the body that's disabled. Not disabled because this injury prevents him from returning to gainful employment ***

* * * *

O: I mean, what he's saying is that there's nothing wrong with you. That's what he's saying. Ah, I can try to settle it with this, but it's not worth the kind of money that he could have—if he's said 20 to 25 percent of the back, the neck, legs, arms, ah—I don't know what the hell's wrong with him. Ya know Neff tells me this is only gonna help you—this doesn't help you.

P: Yeah?

O: Back and neck sprain. Well,—ah—do you want to have him do a new report? Fine. Or I can just send this one out, and try to get something for it.

O: Nathan—you know the least they could do is come up with a hell of a better report than this. The thing is—you know—he's protecting his ass. It doesn't help if he doesn't say you have a permanent injury, it just says you have 20 to 25 percent disabled, because of the classification of the type of work that you do, that you do manual labor. That doesn't impress State Farm. That doesn't make sense whether you're working or not. He says you have a 20 to 25 percent permanent partial injury of a certain part of your body. That's what would be most beneficial.

P: Well, let's see, why don't we see what the insurance companies will say. Will they make an offer, or will you have to—

O: No, they will give an offer, probably within a week.

P: Why don't you do that, and see what they say—if it's unreasonable—then we'll have Coifman do his bill over again, or his report.

O: He can't do his report over.

P: Well, he can specify as to what he feels is—

O: He'd have to do an amended report.

P: Yeah.

O: Okay, I'll take care of it that way, then.

P: Cause I'd just as soon get it over—if we can get what we want—I'd just as soon not create any more questions about this than we have to.

O: Okay—

P: Cause I don't know how well it could stand up under real close—if you understand what I'm saying.

O: Probably not too well.

After this meeting, defendant sent all medical and hospital reports and all medical bills to the Travelers and State Farm insurance companies. On December 20, 1978, defendant received calls from agents of State Farm and Travelers who both indicated a willingness to settle Bower's claim. Defendant subsequently negotiated settlements with the agents of State Farm and Travelers. During a discussion with the agent of Travelers, defendant indicated that the Coifman medical bills were too high and that he would try to negotiate Coifman's bill to a lower amount with Coifman's office. Defendant did later confer with Nathan Neff and was able to get Coifman's bill reduced from approximately $3,850 to $1,865.50. However, defendant never informed the insurance companies of this reduction. As a result of the negotiation between defendant and the insurance agents, on December 20, 1978, defendant received $7,315.60 from Travelers Insurance Company and $4,897.60 from State Farm as full settlement for all of Bowers' claims.

On December 21, 1978, Powers-Bowers called defendant and defendant informed him that he could come to defendant's office that afternoon to pick up his check. Powers-Bowers met with defendant later that afternoon. Defendant told him that Dr. Coifman would receive $1,865 out of the settlement and Bowers would receive $6,275. Defendant's fee for the case was $3,037.87. Defendant expressed concern that the Hennepin County Welfare Department had not filed a lien against the settlement since they had paid $1,538 of Bowers' medical bills. Therefore, defendant retained $1,538 out of the settlement in case the welfare department later filed a lien. During this meeting between defendant and Powers-Bowers, the following discussion took place:

O: They don't want to pay anything. They fought all this. I just can't get the kind of money from Travelers that I should have been able to get in your particular case because of Coifman's bad report, okay? That is a bad report. Coifman doesn't know that you're getting seven thousand plus another thirteen and so on and so forth. He doesn't know that.

P: He doesn't know that. Okay.

O: No, absolute not. He thinks you're settling for, ah, forty eight.

* * * *

O: I've never been served with a welfare lien. If I had, I couldn't do what I'm doing.

P: Okay.

O: Now that's where Welfare slipped up. They're supposed to send me a welfare lien but the case is only six months old so they probably haven't gotten to it yet. When they get to it, I will then tell them what I collected and once you arrange for an attorney, welfare will pay me one third to collect the money.

P: I see.

O: But they're going to want the other two thirds back.

P: So okay, that sixteen you might have to pay two thirds of the hospital bill back to Welfare.

O: That's right. ***

P: If they find out about this.

* * * *

P: Okay, I've heard stories now about insurance investigators following people around to find out if they were really hurt. Am I going to have to watch out?

O: Your case is over. Your case.

P: Okay, I don't *** Okay, it doesn't make any difference if ***

O: Because if you don't ***

O: The only problem you've got is from welfare or from Coifman. That's the only problem you've got. You say that Coifman ***

P: Coifman, Coifman ain't gonna argue with this because he knows that ***

O: You told me that he didn't do half the work that he said he did.

P: *** He knows he didn't, get knows that I wasn't hurt right from the get-go.

O: Okay, I know that, you told me that, and that's why I settled for what you asked me to settle for ***

O: and there's isn't any two ways about it, that's ah ***

P: He's not going to argue about that.

O: That, that, I've got certain risks here and my risks are if welfare comes I've got to pay them. That's what I'm holding the money for.

P: Okay.

O: I'm writing the letter the way I'm writing it, ya know, to protect myself. I don't trust Neff.

P: Well, Neff, Neff ain't going to say nothin's either because *** I walk in the office and tell him that I wasn't hurt in the accident and Coifman asks me how bad do I want to have been hurt.

O: Ya.

P: He ain't gonna argue with this.

O: I don't like to hear you tell me that. I don't even want to know that.

P: All right, I didn't tell you that.

* * *

O: This is from Travelers. And there's ah, yeah, here they are. I can give you a copy of this explanation of payment, seven thousand bodily injury, three hundred thirteen dollas and sixty cents for property damage. I think it's a hell of a fair settlement.

P: I, I, well for someone that wasn't even hurt, that's ***

* * *

P: Okay, I, I ain't going to have to worry about no insurance man watching me or nothing?

O: No.

P: I don't have to keep pretending I've been hurt or nothing?

O: No, the case is over with.

P: Okay, good

O: You're settling. The full and final settlement, I mean you don't want, say, somebody to call the insurance company some day and say you never were hurt, you know so, ***

P: Say, what ***

O: But if they do, I don't know anything about that.

P: I got a question, what happens if Neff or Coifman get busted some time and they snitch me off.

O: Well, they don't even know you, you're getting any money on this case.

P: Yeah, but they know that, ah, well, they figure that I'm getting something out of it.

O: Well, yeah, They think you're getting a couple thousand dollars.

P: Well, I mean on a phony claim, a thou, a couple thousand dollars, I would go to jail.

O: Well, why should they snitch you off. They're the doctors.

* * *

O: I'm protected on this because I don't know that you weren't hurt.

P: Right.

O: No one's ever told me that.

P: Well, I'm not going to tell you that.

O: I'm just an advocate trying to get you the best kind of, ah, settlement possible ***

P: Right.

O: And, ah, my only thing is that I just know too damn much about Coifman, and that's why you're the last case I've taken out of that place.

P: Ah ***

O: I haven't taken any since because you just get me nervous.

P: Well, ah, if I get in any trouble or anything I'll give you a call. And maybe you can help me out there.

O: He's not going to give you any problems.

P: No, I don't mean that, I mean if ever I get in any trouble or some, well, maybe I'll have an accident next year. This is an easy way to make some money.

O: Well, but, they're going to know you have a preexisting claim now.

P: Ya, that's true.

O: Ya, but it's not an easy way ***

P: You couldn't do that, too often, I don't suppose.

O: No.

P: Aggravate ***

O: You went in the hospital, ah, the hospital's gonna have records now Coifman's put things there.

P: Yeah.

O: Ah, people have accidents several times a year but, ah, it doesn't work after the first one if it's too often. You shouldn't have another one for five years if you want to make money.

On January 14, 1979, a search warrant was executed at Dr. Coifman's office. On January 15, 16, and 17, defendant tried to reach Powers-Bowers by phone. On January 17, 1979, soon before a search warrant was executed at defendant's office, Powers-Bowers returned defendant's calls and the following discussion took place:

O: *** [A] client, totally unrelated to you, indicated that, ah, that they were making an investigation of Dr. Coifman and Nathan Neff.

P: They're what?

O: Ah, that the police department's making an investigation of, ah, of Coifman and Neff.

P: What's that going to do to me?

O: Well, nothing, you had a legitimate injury, didn't you?

P: Well, you know about that.

O: Well, you told me it was legitimate. You know, so they're not going to do anything to you. You know, were you faking anything? Cause if you were, you've got a problem. But, ah, you were in the hospital. As a matter of fact, you were treated by another doctor named Engel, weren't you?

P: Ya.

O: And I read Engel's report and Engel found you had a problem so ***

P: Well, you know what, I, I, told you that, I mean that's ***

O: Well, what you told me is you had, is you had a problem.

P: I didn't, I didn't tell ***

O: Ah, and, ah, and, there's a lot of people that see Coifman that they have legitimate problems. I'm sure on occasion there's somebody that sees Coifman that doesn't have a problem. And they're working something out. Hell, when you and your girlfriend were in the office, you indicated well, you know, you didn't know how serious the problem was. And I told you I don't know how many times, that's between you and Coifman. I've never gone to medical school and I'm not a doctor. I think I told you when you were first here, that you know, I don't like doing business with Coifman and as a matter of fact, hadn't for several months. As a matter of fact, you were the very last person that I had anything to do with Coifman. I wouldn't touch a patient from Coifman's office for a million dollars. Let's put it this way, for five billion dollars, because, ah, ya know, things just don't look right. But you know, I don't think there's anything to worry about, cause you had a legitimate injury, another doctor examined you, or was there even a third doctor. ***

This was Powers-Bowers' last conversation with defendant.

At no time during their relationship did Powers-Bowers tell defendant that no accident had occurred or that the accident report or repair bill were fictitious. Additionally, Powers-Bowers never told defendant, Dr. Coifman, or Dr. Engel that he had a preexisting lower back condition which was not caused by an automobile accident.

The issues presented in this appeal are:

(1) Whether the prosecution engaged in misconduct which denied defendant a fair trial?

(2) Whether the trial court erred in admitting into evidence the tape recordings of communications between defendant and the undercover police officer which were obtained without a warrant but which were consented to by the police officer?

(3) Whether the trial court erred in permitting the jury, while listening to the recorded conversations between defendant and the undercover police officer, to refer to transcripts of those recordings?

(4) Whether there was an inconsistency in the jury verdict for which a new trial is required?

(5) Whether the trial court erred in refusing to dismiss either the two counts of conspiracy or the attempted theft counts?

(6) Whether the trial court improperly instructed the jury on the issue of reasonable doubt?

(7) Whether the trial court erred in accepting a partial jury verdict?

(8) Whether the trial court erred in refusing to dismiss the indictment?

(9) Whether there was sufficient evidence for the jury to find that defendant committed the crimes of attempted theft by swindle?

(10) Whether the trial court erred in dismissing the entrapment defense?

(11) Whether the trial court properly conducted the Schwartz hearing?

1. A trial, the prosecution asked various questions of Detective Meath and Deputy Powers (Bowers) concerning the police investigation into the possible illegal activities of Dr. Coifman and Coifman's business manager, Nathan Neff. Defendant argues that the prosecution, by asking these questions, sought to repeatedly suggest to the jury

that there was some type of "sinister" cooperation between Coifman, Neff, and defendant and to associate defendant with Coifman and Neff's illegal acts. Defendant contends that this questioning was improper and served to prejudice defendant and deny defendant a fair trial since defendant was not being tried for a conspiracy between him and Coifman and/or Neff.[2]

The questions asked by the prosecution were not improper and the evidence introduced by means of these questions was admissible. The evidence admitted concerning Coifman and Neff served to provide the jury with background information concerning the police investigation into insurance fraud and showed how Deputy Powers came to be associated with defendant. Such background information is relevant evidence and is admissible. Rules 401 and 402, Rules of Evidence; *see* Advisory Committee Note to Rule 401, Fed. Rules of Evidence. Of course, relevant evidence may be excluded pursuant to Rule 403, Rules of Evidence, if the danger of unfair prejudice substantially outweighs its probative value. However, rulings on evidentiary matters rest within the sound discretion of the trial court. *E.C.I. Corp. vs. G.G.C. Co.*, 306 Minn. 433, 437, 237 N.W.2d 627, 630 (1976). The trial court determined that the background evidence concerning the police investigation of Coifman and Neff was admissible and this determination was not an abuse of the trial court's discretion.

Defendant also claims that questions asked of two defense witnesses by the prosecutor as to whether an attorney had a higher duty than to represent the best interests of his client was clearly prejudicial to defendant. The first reference to a higher duty was made by the prosecuting attorney when he was cross-examining a defense witness who had been qualified as a legal expert in the area of personal injury claims. The question was asked in this context:

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[2] **The indictment against defendant originally alleged a conspiracy between defendant, Powers-Bowers, "and others." The "and others" language was depleted prior to trial. Therefore, the trial did not concern any conspiracy between defendant and Coifman and/or Neff.**

Q. *** You have told us that there is an obligation on an attorney to represent his client's best interests and go forward with his claim in keeping with his obligations to the client and to the code of ethics, is that a fair summary?

A. I think so, true.

Q. Is there a higher duty than that which would run to a client who walks in off the street and asks you to do something for him?

Mr. Collins: I'm going to object to this, Your Honor, on the grounds it's immaterial, irrelevant. Also, improper.

The Court: I will sustain on the first ground.

A similar question was asked during the prosecution's cross-examination of defendant as follows:

Q. You mentioned an ethical duty to represent your client's best interests, I believe?

A. Yes, sir.

Q. Do you have a higher duty than to represent a client's interests?

Mr. Collins: I'm going to object to that, Your Honor, on the grounds that it's immaterial and irrelevant. May we approach the bench?

The Court: Yes.

* * *

The Court: I will sustain an objection to the question.

Defendant argues that through these questions the prosecution sought to suggest that defendant, because of his status as a lawyer, has a higher duty to obey the law than does an ordinary citizen. However, these questions appear only to have been asked in order to establish that an attorney's duty to obey the law outweighs any ethical duty to zealously pursue his clients' claims and did not suggest that a lawyer has a greater duty to obey the law than others. As such, these questions were not improper nor did they serve to deny defendant a fair trial especially since the trial court sustained objections to these questions.

Prior to trial, Detective Meath interviewed Dr. Engel, the doctor who had examined Powers-Bowers during his hospitalization, and made a report of that interview. Defendant claims that the state failed to produce the report of the interview with Dr. Engel and that such failure violated Rule 9.01, Rules of Criminal Procedure, and defendant's due process rights. Even assuming that the failure to turn over this information was improper, it is clear that defendant was not prejudiced thereby. Defendant had Detective Meath's report in his possession at trial and, in fact, submitted this report into evidence. Furthermore, Rule 9.01, subd. 1(a), Rules of Criminal Procedure, was not violated because Dr. Engel appeared as a witness for the defense at trial. The state did not call him as a witness.

2. Defendant asks this court to hold that the use at trial of oral and wire communications, intercepted by means of electronic monitoring and recording devices with the consent of one of the parties to the communications, violated defendant's constitutional right against unreason-

able searches and seizures since no warrant was obtained for the interceptions.

We recently addressed this issue in *State v. Bellfield,* 275 N.W.2d 577, 578 (Minn. 1978), and held:

> Because one of the parties to these conversations—i.e., the informer—voluntarily consented to the taping of these calls, no warrant was required by either the Federal or state statutes relating to interception and recording of telephone communications, and no Fourth Amendment issue is presented.

See also United States v. White, 401 U.S. 745 (1971); Minn. Stat. §626A.02, subd. 2(c) (1978). Our *Bellfield* ruling is dispositive of the issue presented and we, therefore, reject defendant's argument.

3. At trial, the jury was allowed to refer to transcripts of tape recorded conversations between defendant and Powers-Bowers while the jury listened to the actual tape recordings of those conversations. Defendant argues that the trial court committed reversible error by allowing such use of these transcripts.

In *United States v. McMillan,* 508 F.2d 101 (8th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975), the Eighth Circuit set forth guidelines for the use of transcripts of tape recordings at trial as follows:

> If accuracy remains an issue, a foundation may first be laid by having the person who prepared the transcripts testify that he has listened to the recordings and accurately transcribed their contents. (Citations omitted.) Because the need for transcripts is generally caused by two circumstances, inaudibility of

> portions of the tape under the circumstances in which it will be replayed or the need to identify the speakers, (citations omitted) it may be appropriate, in the sound discretion of the trial judge, to furnish the jurors with copies of a transcript to assist them in listening to the tapes. In the ordinary case this will not be prejudicially cumulative. (Citations omitted.) Transcripts should not ordinarily be read to the jury or given independent weight. The trial judge should carefully instruct the jury that differences in meaning may be caused by such factors as the inflection in a speaker's voice or inaccuracies in the transcript and that they should, therefore, rely on what they hear rather than on what they read when there is a difference. Transcripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence. (Citation omitted.)

508 F.2d at 105-106. These guidelines appropriately recognize the need for the use of transcripts in certain instances and at the same time serve to protect against any undue emphasis which might be given to such transcripts.

In this case, the accuracy of the transcripts was in issue. Therefore, Deputy Powers, the preparer of the transcripts, laid a proper foundation for their use. He testified that he prepared the transcripts after listening to the tapes several times and that the transcripts accurately reflected the conversations between defendant and him. Additionally, the tapes were not clearly audible in part and the transcripts served to identify the speakers. Therefore, the trial court did not abuse its discretion in determining to allow the use of the transcripts. Furthermore, the trial court carefully admonished the jurors to rely on what they heard rather than on what they read:

> [The Court]: All right, we will proceed with the recordings. Jurors, you will each be provided with what is purported to be a transcript of the taped conversation. The parties do not agree that the transcripts are exact transcripts, nor do they agree as to what was said or what was heard from a portion of the tapes in some instances. The differences in understanding of meaning or meaning what was said may be caused by such factors as the inflection of a voice or inaccuracies of the transcript and you should rely upon what you hear rather than what you read if you find a difference between the tape and the transcripts. The transcripts are provided to you to assist you in listening to the tapes and will be collected from you at the conclusion of the playing of each tape. The transcripts will not be available to you during your deliberations to reach a verdict.
> Sometimes on the tapes it appears that two or more persons talk at the same time. It is for the jurors to determine from the tape which party talked first. The transcript is not to control. The tape is to control.

A transcript of each tape was distributed to the jury just prior to the playing of that tape and was immediately picked up after that tape was played. The transcripts were not placed in evidence; only the tapes were. Thus, the *McMillan* guidelines were carefully followed and no error occurred.

4. Defendant was charged with two counts of conspiracy and two counts of attempted theft. The jury returned a verdict of guilty on the attempted theft counts but was unable to reach a verdict on the conspiracy counts. Defendant argues that this constitutes an "inconsistent" jury verdict.

We do not agree with defendant's argument that the failure to reach a verdict on certain counts may serve to render a verdict inconsistent. Furthermore, even assuming *arguendo* that there is any inconsistency in the verdict returned by the jury, reversal is not required as defendant suggests. This court has adopted the majority rule with respect to inconsistent jury verdict as follows:

> The general rule is that a defendant who is found guilty of one count of a two count indictment or complaint is not entitled to a new trial or a dismissal simply because the jury found him not guilty of the other count, even if the guilty and not guilty verdicts may be said to be logically inconsistent.

State v. Juelfs, 270 N.W.2d 873, 874 (Minn. 1978). Therefore we find defendant's argument to be meritless.

5. Defendants argue that the indictment charging him with two counts of attempted theft and two counts of conspiracy was multiplicious. Defendant makes this argument by contending that attempted theft and conspiracy were essentially identical crimes in this case. Defendant claims, therefore, that the trial court erroneously refused to dismiss either the attempted theft counts or the conspiracy counts of the indictment.

The essential elements of the crime of attempt are: (1) an intent to commit a crime, and (2) a substantial step taken toward the crime's commission. See Minnesota Practice Crim. Jury Instruction Guides 5.01 (1977). The elements of the crime of conspiracy are: (1) an agreement with another to commit a crime, and (2) an overt act in furtherance of the conspiracy. *See* Minnesota Practice Crim. Jury Instruction Guides 5.07 (1977). Thus, the crimes of conspiracy and attempt each require distinct elements of proof and are entirely separate crimes. State v. St. Christopher, 305 Minn .226, 235-36, 232 N.W.2d 798, 803-04 (1975); *Cf. United States v. Brodbeck,* 430 F.Supp. 1056 (Wis. 1977). It was, therefore, proper to charge defendant with both the crimes of conspiracy and attempted theft in the indictment.

6. The trial court, in its instructions to the jury, defined proof beyond a reasonable doubt as follows:

> A reasonable doubt is doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely on and act upon in the most important of your own affairs.

Defendant argues that this instruction is erroneous because it defines reasonable doubt in terms of a "willingness to act." Defendant contended at trial that reasonable doubt should be defined in terms of a willingness to act *without hesitation.*

The proposed instruction on reasonable doubt in Minnesota Practice Crim. Jury Instruction Guide 3.03 contains, in pertinent part, language which is identical to that used by the trial court in this case. The comment to that proposed instruction rejects the use of the term "without hesitation" on the ground that it suggests a recklessness which is antithetical to the rational process to be pursued by a jury. We agree.

Defendant also contends that the trial court's instruction was erroneous because it did not convey to the jury that they would have no reasonable doubt if they were "morally certain" of their decision. In *State v. Boykin,* 312 Minn. 593, 252 N.W.2d 604 (1977), we upheld the trial court's decision not to give a "moral certainty" instruction. In doing so, we cited *United States v. Lawson,* 507 F.2d 433 (7th Cir. 1974), *cert. denied,* 420 U.S. 1004 (1975), and quoted with approval the following language from that case:

> Because of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion. That this difficulty may be surmounted is evidenced by the attempts which have been approved, although the language of approval has frequently implicitly suggested the difficulties of articulation. That the difficulties may be surmounted, however, does not mean in our opinion that the effort has to be made.
>
> The essential aspect of the matter it appears to us is that the jury clearly understood that there must be proof persuasive beyond a reasonable doubt. Defining the term should be at the option of the trial judge even though a defining instruction is tendered. Lack of definition would not appear to be prejudicial. 507 F.2d at 442.

312 Minn. at 594, 252 N.W.2d at 606. We find that the instruction given in this case adequately conveyed the concept of proof beyond a reasonable doubt to the jury.

7. Defendant claims that the trial court committed reversible error by accepting a partial jury verdict. Since each count of an indictment is to be treated as a separate indictment, *People v. Pierce,* 40 App. Div. 2d 581, 334 N.Y.S.2d 410 (1972), we find that it was not improper to accept a verdict on only some of the counts charged when the jury was unable to reach a verdict on all counts. *See Selvester v. United States,* 170 U.S. 262, 265 (1898); *Tyler v. United States,* 397 F.2d 565, 570 (5th Cir. 1968), *cert. denied,* 394 U.S. 917 (1969).

8. Defendant argues that prosecutorial misconduct occurred during the grand jury proceedings which so tainted those proceedings that the indictment should have been dismissed.

Defendant first contends that the prosecution improperly elicited testimony from Detective Meath concerning the investigation of Dr. Coifman and Nathan Neff and improperly allowed the grand jury to use transcripts of the taped conversations between defendant and Powers-Bowers. These contentions have been dealt with and rejected above.

Defendant also argues that the prosecution improperly failed to provide a verbatim record of all statements made by the prosecution to the grand jury. Rule 18.05, subd. 1, Rules of Criminal Procedure, does not require that all statements made by the prosecution be recorded. It only requires that a record be made of all statements of grand jury witnesses as follows:

> A verbatim record shall be made by a reporter or recording instrument of the evidence taken before the grand jury and of all statements made and events occurring while the witness is before the grand jury.

This requirement was complied with in this case.

In addition, defendant suggests that pre-grand jury publicity concerning this case served to unfairly prejudice the grand jury's determination. However, defendant does not explain how this publicity affected the proceedings, nor does he present any evidence showing that the publicity had any effect on the grand jury. Therefore, we must reject defendant's argument as merely speculative.

Lastly, defendant argues that the prosecution engaged in misconduct during the grand jury proceedings by failing to present evidence to the grand jury concerning the medical examination of Powers-Bowers by Dr. Engel. Defendant claims that the failure to produce this evidence was improper because it constituted exculpatory evidence. The export of Dr. Engel's examination of Powers-Bowers indicated that Powers-Bowers had a valid lower back injury and defendant reviewed this report. Defendant claims that he justifiably relied on this report in determining that Powers-Bowers had a valid claim against the insurance companies and that, therefore, the medical report was exculpatory.

Defendant's characteriztion of this evidence must be reviewed not in a vacuum but in context with the other evidence presented to the grand jury. The failure to produce this evidence will not require reversal unless it would have materilaly affected the procedings. *See generally Brady v. Maryland,* 373 U.S. 83 (1963). The evidence presented to the grand jury showed that although certain medical reports indicated that Powers-Bowers had a valid injury, defendant was repeatedly told by Powers-Bowers that he was not injured and that Powers-Bowers had successfully feigned injury while in the hospital. Thus, the Engel medical report cannot be said to be evidence which would have materially affected the grand jury determination. Therefore, the trial court did not err in refusing to dismiss the indictment.

9. Defendant contends that there was insufficient evidence presented at trial to sustain a verdict of guilty of the crimes of attempted theft by swindle. In determining the sufficiency of the evidence in a criminal matter, this court "must view the evidence in a light most favorable to the jury verdict and decide whether the jury could reasonably have found the defendant guilty of the crime charged." *State v. Swain,* 269 N.W.2d 707, 712 (Minn. 1978).

The only disputed issue before the jury in this case concerned the intent element of the crime of attempted theft by swindle. The essence of a swindle is the defrauding of another of his property by deliberate artifice. *State v. Ruffin,* 280 Minn. 126, 129-30, 158 N.W.2d 202, 205 (1968); *State v. Wells,* 265 Minn. 212, 214, 121 N.W.2d 68, 69 (1963). The offense covers a broad range of fraudulent conduct and, thus, the various elements of the offense are incapable of precise definition. 280 Minn. at 130, 158 N.W.2d at 205. However, in the context of insurance fraud, it is our conclusion that the intent element may be satisfied through proof that the defendant knew of the falsity of a claim which he presented to an insurance company or presented a claim which he knew to be unjustified by the information in his possession.

We find that there was clearly sufficient evidence to support the guilty verdict in this case. The evidence supporting the conviction is outlined above. This evidence indicates that defendant presented Powers-Bowers' claims to two insurance companies even though Powers-Bowers had told defendant that he was not injured.

At trial, defendant took the stand and testified that he never understood that Bowers was faking his injuries. He testified that during their relationship, Bowers acted weird, that he reminded defendant of a "Glenwood Hills patient", that Bowers posed "strange hypotheticals" to him, and that he had to humor Bowers. Defendant testified that although Bowers told him at times that he was not hurt, defendant relied on the accident reports, medical reports, and Bowers' explanation of the accident and his injuries to determine that Bowers had a valid claim. Defendant's wife, Nancy Oklon, also testified on behalf of defendant. She stated that defendant had difficulty listening to and comprehending the statements of other persons. She also testified that defendant, at times, displayed a bizarre sense of humor and sometimes made inappropriate jokes. A number of other witnesses all testified to defendant's good reputation for truth and honesty in the community.

Defendant's claimed reliance on medical reports in concluding that Powers-Bowers had a valid injury must be viewed in light of the contrary evidence that Powers-Bowers had informed defendant that Dr. Coifman knew that he was not injured and that Powers-Bowers had been able to "fool" everyone at the hospital with respect to his injuries. The jury was at liberty to disbelieve defendant's evidence and could conclude from all the evidence either that defendant knew that he was presenting a false claim or that defendant knew the claim to be unjustified based on the information given to him by Powers-Bowers.

Defendant also argues that, in settling his client's claims, he was only discharging his ethical duty as a lawyer to represent his client zealously. Defendant also contends that he had a special duty in this regard because Bowers was a "street person" who displayed "psychotic" tendencies. The short answer to this contention is that although an attorney does have the duty to represent his client zealously, he must do so *within the bounds of the law. See* Canon 7, Code of Professional Responsibility.

10. Defendant argues that the trial court erred in dismissing the entrapment defense raised by defendant. The trial court determined that the state merely provided defendant with the opportunity to commit the crime and that, therefore, no entrapment occurred.

The leading case in Minnesota on the defense of entrapment is *State v. Grilli,* 304 Minn. 80, 230 N.W.2d 445 (1975). In that case, we stated:

> In order to decide whether defendant was entrapped, focus must be placed on the necessary elements of the defense. The long-established, presently prevailing majority rule associated with the majority opinions in the three United States Supreme Court cases, *Sorrells, Sherman,* and *Russell,* has been termed the "subjective" test. *United States v. Russell,* 411 U.S. 423, 440, 93 S.Ct. 1637, 1647, 36 L.Ed.2d 366, 378 (Mr. Justice Stewart dissenting). In the

> majority view, the inquiry on entrapment is concerned primarily with the element of defendant's predisposition: whether it was his own original intent to commit the crime charged. The defense must show that the actions of the police went further than those necessary to produce evidence of the defendant's criminality.
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> * * *
>
> In disposition of the case before us, we maintain our support of the majority view as expressed in *Sorrells, Sherman,* and most recently in *Russell,* that "predisposition" as well as "inducement" should be considered when the entrapment issue arises before (or during) trial. We therefore adhere to the "subjective" approach in so far as it retains "predisposition" as an ingredient of entrapment cases.

304 Minn. at 89, 91-92, 230 N.W.2d at 452, 453 (footnote omitted).

With respect to proof of the element of inducement, the majority view is that the evidence must show that the state did something more than merely solicit the commission of a crime. *See United States v. Burkley,* 591 F.2d 903 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 966 (1979); *United States v. Deupre,* 423 F.2d 1069 (4th Cir. 1970), *cert. denied,* 402 U.S. 950 (1971); *United States v. Costello,* 483 F.2d 1366 (5th Cir. 1973); *United States v. Christopher,* 488 F.2d 849 (9th Cir. 1973). *But see United States v. Licursi,* 525 F.2d 1164 (2d Cir. 1975), United States v. Armocida, 515 F.2d 49 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975). Although we have not heretofore directly addressed this question, we find that something in the nature of persuasion, badgering, or pressure by the state must occur before the inducement element is satisfied.

In addressing the element of predisposition, we have stated:

> [W]here the state can show the defendant's "predisposition" by evidence of (a) defendant's active solicitation to commit the crime, (b) prior criminal convictions, or (c) prior criminal activity not resulting in conviction (as here), or (d) defendant's criminal reputation, or by any other adequate means the challenged conduct of the state's officers is mitigated or excused, and the defense of entrapment is not proved.

304 Minn. at 89, 230 N.W.2d at 452. In this case, there was no evidence that defendant actively solicited the commission of the offense, had prior criminal conviction, had engaged in prior criminal activity, or had a prior criminal reputation. Therefore, we must determine whether defendant's predisposition was shown by *other adequate means.* In a number of cases, courts have found that predisposition may be proved by evidence that the accused readily responded to the solicitation of the commission of a crime by the state. *See United States v. Spain,* 536 F.2d 170 (7th Cir.), cert. denied, 429 U.S. 833 (1976); *United States v. Pricto-Olivas,* 419 F.2d 149 (5th Cir. 1969); *United States v. Ortiz,* 496 F.2d 705 (2d Cir. 1974). *See generally Masciale v. United States,* 356 U.S. 386 (1958); *State v. Poague,* 245 Minn. 438, 72 N.W.2d 620 (1955). We acquiesce in this view.

We conclude that the evidence is sufficient to show that defendant was not induced into the commission of any offense and that defendant readily responded to the solicitation by Powers-Bowers. The evidence indicates that Powers-Bowers went to defendant and indicated to him that he wanted to file an insurance claim even though he was not injured. The evidence also indicates that defendant readily agreed to represent Bowers. Furthermore, the evidence shows that Bowers did not exert pressure on defendant. In fact, Bowers clearly told defendant that defendant could withdraw from representat ion if he wished to as follows:

> P: Because, ah—as a matter of fact I would say that if—if you're worried about me, maybe you should —maybe I should go find some other attorney— if—ah—I mean this is here again, like I, I'm not going to say anything—they're sure not gonna.
>
> * * *
>
> P: Sure. And after you check that over, and decide you don't want me around, just let me know.

(Emphasis added.)

Therefore, we conclude that the trial court did not err in dismissing the entrapment defense.

11. Subsequent to trial, Mr. Tom Matthews, a television investigator, sent a letter to Judge Amdahl which stated that he had heard from at least two sources that anti-Semitic remarks may have occurred during the jury deliberations. The letter also indicated that one of the jurors may have been predisposed to find defendant guilty before the jury deliberations began. Judge Amdahl also

received two affidavits from a Mr. Cox, the father of a juror, and a Mr. Hunter. The Cox affidavit indicated that "anti-Semitism" may have occurred during the deliberations. The Hunter affidavit indicated that a juror may have had, during the trial, an improper discussion with the juror's employer about the trial. On the basis of this information, the trial court granted defendant's motion for a "Schwartz" hearing pursuant to Rule 26.03, subd. 19(6), Rules of Criminal Procedure.

The trial court determined to call six of the jurors to testify at the hearing for the following reasons:

> The Court requested six of the twelve jurors to appear for questioning concerning alleged statements indicating religious bias. Two of the six were jurors named in the document filed with the Court (a letter from Mr. Matthews—a TV investigator—and an affidavit of the father of one of the jurors) reciting alleged anti-Semitic conduct. A third juror was one who was named in an affidavit filed concerning a lunch-time contact with his employer, and, because his presence was needed to question him on that event, was also to be one of the jurors to be questioned about the anti-Semitic allegation. A fourth was one of the oldest jurors who was selected by the Court because Mr. Matthews' letter referred to "an older man" as a source of a statement indicating bias. The fifth juror was the foreperson of the jury, and the sixth was chosen at random from the remaining jurors to bring to 50% the jury representation at the hearing.

At the hearing, all of the six jurors called testified that they had not heard any anti-Semitic remarks during the deliberations. The juror who had had the contact with his employer testified that the contact had not influenced his decision-making. Therefore, the court denied defendant's motion for a new trial because of juror misconduct.

Defendant argues that the trial court conducted the Schwartz hearing improperly. He first contends that the trial court should have called all 12 jurors to testify instead of six. While there are no cases which have addressed this issue, we find that the manner in which a Schwartz hearing is conducted rests within the sound discretion of the trial court. In this case, the trial court did not abuse its discretion in determining to call six jurors, four of whom were referred to in the allegations of misconduct. This is especially true in light of the fact that no juror misconduct was revealed by the testimony of the six jurors.

Defendant also contends that the trial court improperly limited the scope of inquiry at the Schwartz hearing. Prior to the hearing, defense counsel requested that he be allowed to inquire into the possible predisposition of an older juror to convict from the beginning of the deliberations. The court denied this request.

The trial court properly determined not to allow questioning concerning the predisposition of any jurors. Rule 606(b), Rules of Evidence, provides:

> Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment

> or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Thus, under the rule, the thought processes of a juror are protected from later inquiry. *See* 1977 Committee Comment to Rule 606. Any inquiry into the predisposition of a juror would constitute improper scrutiny of the state of mind or the thought process of the juror in contravention of Rule 606(b).

We have considered all other arguments raised by defendant and have determined that they are without merit. The judgment is, therefore, affirmed.

Affirmed.

Amdahl, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

YETKA, Justice (dissenting).

I dissent. The role of this court, the court of last resort for most parties, is to see that justice is done in the courts of this state. When we are of the firm conviction that a mistake has been made or that an injustice has been done to a party, it is our duty to correct the wrong. While I do not think the trial court erred based upon our prior decisions, there are a number of troubling factors in this case which, in my view, warrant reversing the conviction.

The facts of this case are unlike any other case this court has seen. The police were not after Ellis Olkon; they were after Dr. Robert Coifman, who was suspected of issuing fraudulent medical reports. The police had no information nor any suspicion that Olkon was involved in any fraud schemes. They decided to "test" Olkon only after Dr. Coifman referred policeman Walter Powers to Olkon. Thus, the police had no rational justification for setting a trap for Olkon.

Olkon received both a police report indicating that an automobile accident had occurred and medical reports indicating that Powers was injured. Some of the medical reports were from Dr. Coifman, whom, as the majority indicates, Olkon may have had reason to doubt. However, Olkon also received a report verifying the injury from Dr. Engel, a physician totally independent of Dr. Coifman and beyond any suspicion.

Of course, Powers told Olkon he had fooled the doctors. Olkon had good reason to disbelieve this assertion due to the medical reports themselves, Powers' highly unusual behavior, and a medical report indicating that Powers had a character or personality disorder. It is also relevant here that Powers never denied that the accident had occurred. Olkon believed Powers was a "macho" type trying to downplay his injuries.

Moreover, Powers had not really fooled the doctors at all. Powers had previously suffered a real back injury. He disclosed this fact neither to his doctors nor Olkon. Thus, in reality, Powers had not fooled the doctors; the doctors' reports were correct and Olkon was justified in relying on them. With these facts in mind, we can turn to the troubling issues presented.

Olkon urges that the indictment should have been dismissed because the prosecutor failed to disclose to the grand jury known exculpatory evidence: Dr. Engel's report verifying the injury and the fact that Powers did in fact have a real back injury. Since the duty of a grand jury "is to clear the innocent, no less than to bring to trial those who may be guilty," *United States v. Dionisio,* 410 U.S. 1, 16-17 (1975), several courts have held that a prosecutor has a duty to disclose known exculpatory evidence to the grand jury.[8] The ABA Standards for Criminal Justice, *The Prosecution Function* §3.6(b) (Approved Draft 1971) states, "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." We previously urged prosecutors to follow this standard. *See State v. Florence,* 306 Minn. 442, 457 n. 19, 239 N.W.2d 892, 902 (1976).

Applying these standards to this case, I would hold that the indictment should have been dismissed. It is specious to argue that these items of evidence were not significant; they were crucial indicators that Olkon had good reason to file the insurance claim based upon the medical reports he had received.

For many of the same reasons, I believe the evidence in general was not sufficient to support the verdict of guilty of the crime of attempted theft by swindle. As the majority notes, the key issue is whether the prosecution proved beyond a reasonable doubt that Olkon knew the insurance claim was false. First, however, it must be decided whether the claim was totally false. The insurance claim made essentially two assertions: (a) that Powers had a back injury; and (b) that the injury was caused by the accident in question. As noted previously, assertion (a) was *true* because Powers did in fact have a back injury which was properly diagnosed by the doctors. Assertion (b) was false because the back injury was pre-existing. However, Powers never disclosed this to Olkon or to the doctors. Thus, there is no way Olkon can be charged with knowledge of the falsity of assertion (b) so the intent element is simply nonexistent.

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[8] *See, e.g.,* Frink v. State, 577 P.2d 154 (Alaska 1979); Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975); State v. Hall, 235 N.W.2d 702 (Iowa 1975); State v. Herrera, 93 N.M. 442, 601 P.2d 75 (Ft. App.), *cert. denied,* 93 N.M. 683, 604 P.2d 821 (1979).

Even disregarding the pre-existing back inquiry, Olkon cannot be charged with intent to file a false claim. As noted in the facts above, Olkon was justified in relying on the two independent medical reports. Although Powers tried to downplay his injuries, Olkon knew Powers had psychological problems and felt that he was trying to prove his toughness. Olkon was never given reason to doubt that the accident had occurred. Thus, even if the actual existence of the back injury is ignored, Olkon was justified in believing the claim to be proper.

As Powers' attorney, Olkon had a duty to represent him "zealously within the bounds of the law." *Minn. Code of Professional Responsibility*, Cannon 7. The code also provides:

> EC 7-3. *** In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. ***

* * *

> EC 7-19. *** An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.
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> * * *
>
> EC 7-26. The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

Unless a lawyer knows that the client's factual statements are false, his duty is to advocate the client's position zealously. The attorney is not required to make an independent investigation of his client's veracity in an effort to impeach him; that is the duty of the other parties in an adversary system. The insurance companies could have investigated the case and had further medical examinations taken. Unfortunately, the protections of the adversary system were wholly lacking since the insurance companies were in collusion with the police. The insurers never questioned the early medical reports and never indicated any doubt as to the claim.

I do not believe that the defendant would ever have been prosecuted were he not a lawyer. The evidence of guilt is simply too flimsy and ambiguous. I believe the prosecution felt compelled to prosecute him out of fear of possible public censure that it was deliberately being easy on a member of the legal profession.

Under the facts of this case, I would hold that Olkon was justified in filing the claim and that intent to file a false claim on his part was not proven beyond a reasonable doubt.

I also believe the defendant was entrapped and that this is a total defense to the charges brought. In *State v. Grilli,* 304 Minn. 80, 230 N.W.2d 445 (1975), this court adopted the "subjective" test for entrapment. While I believe *Grilli* should now be overruled and the "objective" test adopted, I also believe the facts show that Olkon was entrapped even under the subjective test.

The subjective test of *Grilli* focuses on the particular defendant involved, the key question being whether the defendant was predisposed to commit the crime. There is no evidence whatsoever that Olkon was predisposed to commit this crime. The *Grilli* case stated four specific ways of proving predisposition, but not one of them is true here. The majority states that predisposition can be proven by the willingness of the person to participate in this crime. Neither *Grilli* nor *State v. Poague,* 245 Minn. 438, 72 N.W.2d 620 (1955) supports that principle[4], and we should not adopt it now.

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[4] In State v. Poague, 245 Minn. 438, 72 N.W.2d 620 (1955), the woman charged with being a prostitute ran a "dating service" which could have been a front for a prostitution service and the police were acting on a complaint received. In State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975), the defendant approached the undercover agent with regard to selling him drugs and there was also evidence of prior possession of illegal drugs.

The subjective test has also been referred to as the "origin of intent" test. *See State v. Grilli,* 304 Minn. at 88, 230 N.W.2d at 451. In this case, there is no question but that the whole scheme was contrived by the police in order to trap Coifman. In *Grilli,* we quoted with approval the following from *Newman v. United States,* 299 F. 128, 131 (4th Cir. 1924):

> When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

Since the criminal design here originated with the police and Olkon was lured by numerous deceitful acts into filing the insurance claim, he has a valid entrapment defense even under the subjective test.

In a case with strikingly similar facts, the Illinois Supreme Court held that the attorney had been entrapped under the "Subjective" test. *In re Horwitz* 360 Ill. 313, 196 N.E. 208 (1935). In that case, as here, the detective had created a fictitious accident but never told the attorney it had not occurred. The detective also had a pre-existing back injury but never disclosed it. The medical reports verified the injury but the detective, when concealed witnesses were listening, made statements such as "You know I am not injured." The Illinois court concluded:

> If this entire record is interpreted most strongly against the respondent, it falls short of sufficient ground for disbarment. He was entrapped by a set of false and

> carefully arranged circumstances and evidence sufficiently valid, and apparently real, to deceive an experienced practitioner.

360 Ill. 313, 196 N.E. at 213. Although that case was a disciplinary case, it is even less proper to convict such an attorney of a crime because of the higher standard of proof and the necessity of proving intent. I would apply *Horwitz* and hold that Olkon was entrapped under the *Grilli* test.

I also believe we should now overrule *Grilli* and adopt the objective test. The objective test, as formulated in the American Law Institute, *Model Penal Code* § 2.13(1) (Proposed Official Draft 1962), provides:

> A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by * * *:
>
> * * *
>
> > (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

This test deals squarely with the problem of this case: the fact that many attorneys, not out to commit fraud but to serve their clients diligently, would file a claim if presented with the tactics used and facts of this case. If that is so, then the police have not proven that Olkon is more guilty than other innocent persons. This court should not stand by and allow police to use tactics which do not separate the guilty from the innocent.

The objective test is supported by many of the United States Supreme Court justices in their various concurring and dissenting opinions.[5] The states are clearly free to adopt a stricter test than the federal rule, and many states have done so. In addition to the five state courts which had adopted the objective test noted in *Grilli,*[6] another eleven states have now adopted the objective test by statute.[7] The objective test is also supported by the overwhelming majority of scholarly writing on the subject.[8]

I propose that we now adopt this test. Since the tactics used by the police under the facts of this case created a substantial risk that innocent persons would have been trapped, I would hold that the defendant has made out the defense in this case.

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[5] *See* Sorrels v. United States, 287 U.S. 435, 453 (1932) (Roberts, Brandeis & Stone, JJ., concurring); Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, Douglas, Harlan & Brennan, JJ., concurring); United States v. Russell, 411 U.S. 423, 436 (1973) (Douglas & Brennan, JJ., dissenting); *id.* at 439 (Stewart, Brennan & Marshall, JJ., dissenting). Hampton v. United States, 425 U.S. 484, 496 (1976) (Brennan, Stewart & Marshall, JJ., dissenting).

[6] Grossman v. State, 457 P.2d 226 (Alaska 1969); People v. Barraza, 23 Cal. 3d 675, 591 P.2d 947, 153 Cal. Rptr. 459 (1979); State v. Mullen, 216 N.W.2d 375 (Iowa 1974); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973); State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (1972).

[7] *See* Alaska Stat. §11.81.450 (1979); Ark. Stat. Ann. §41-209 (1977); Colo. Rev. Stat. §18-1-709 (1978); Fla. Stat. Ann. §812.028(4) (West Supp. 1980); Haw. Rev. Stat. §702-237 (1976); N.J. Stat. Ann. §2C:2-12 (West 1980 Special Pamphlet); N.Y. Penal Law §40.05 (McKinney 1975); N.D. Cent. Code §12.1-05-11 (1976); 18 Pa. Cons. Stat. Ann. §313 (Purdon 1973); Tex. Penal Code Ann. tit. 2, §8.06 (Vernon 1974); Utah Code Ann. §76-2-303 (1978).

[8] *See, e.g.,* W. LaFave & A. Scott, *Handbook on Criminal Law* 371 (1972); Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs," 60 Yale L.J. 1091 (1951); Comment, 31 U. Chi. L. Rev. 137 (1963). Other articles favoring the objective test are cited in Park, "The Entrapment Controversy," 60 Minn. L. Rev. 163, 167 n. 13 (1976).

Only two law review articles in the last 25 years have favored the subjective test, one of which favored abolishing the entrapment defense entirely. Y. Kamisar, W. LaFave and J. Israel, *Modern Criminal Procedure* 135 (4th ed.) (Supp. 1979).

One of the vices of entrapment is that the police must themselves break the law to catch supposed criminals. The illegalities in this case include issuing a false driver's license, issuing a false welfare card, writing a phony accident report, issuing a phony receipt for a copy of the report, and writing a false auto repair bill. We know from *United States v Nixon,* 418 U.S. 683 (1974), that even the President of the United States is not above the law. Where is the authority in the Constitutions of the United States or the State of Minnesota or by statute which permits the police in this state to break the law in order to enforce the law? There is the ancient common law rule of fresh pursuit of a law-breaker, but that is inapplicable to this case. We are not a police state *yet.*

Entrapment is not even a necessary technique as to this kind of crime. Doctors, lawyers and insurance companies all keep thorough records on cases. If the police had reason to suspect Coifman or Olkon, they could have used their investigatory skills and powers to find and solve any crimes which had been committed rather than creating new crimes and committing crimes themselves in the process.

The Illinois Supreme Court in *Horwitz* stated:

> For the lawyer in active practice real temptations are plentiful and sufficient without their artificial multiplication by private parties whose real motives can with certainty be known only to themselves. The lawyer must deal with exaggerations, fraud, and actual perjury day after day, and occasionally these things come from his own clients without his knowledge or consent. His path is hazardous at best, and if he can

> so far avoid its natural pitfalls as to maintain and be able to prove a good reputation, it should be sufficient to protect him against plots and schemes.

360 Ill. 313, 196 N.E. at 214. Therefore, even if the federal courts would allow this form of entrapment under the United States Constitution, I would hold the procedure herein used as violative of our Minnesota Constitution.]

Finally, there was evidence submitted to the trial judge that antiSemitic remarks were made during jury deliberations. Rule 26.03, subd. 19(6), of the Rules of Criminal Procedure states that if there is a question about extraneous matters affecting the verdict, "the jurors shall be interrogated." This court has never said whether this rule requires all jurors to be questioned and therefore the trial court was within its rights in questioning only a part of the jury. However, I would think that we ought to interpret the rule to provide that where religious or racial discrimination may have affected the deliberations, all jurors that are available ought to be questioned, particularly in a criminal case.

For all of these reasons, I would reverse the conviction.

WAHL, Justice (dissenting).

I join in the dissent of Mr. Justice Yetka.

STATE OF MINNESOTA
Office of Clerk of Supreme Court

ST. PAUL, MINN.
September 29, 1980

State of Minnesota,
Respondent,
vs. 50966
Ellis Olkon,
Appellant.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
John McCarthy
Clerk Supreme Court

THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT

County of Hennepin and State of Minnesota

THE STATE OF MINNESOTA,

Plaintiff,

vs.

ELLIS OLKON

Defendant.

(Caption)

ORDER AFTER OMNIBUS HEARING

The above-entitled matter came regularly on for hearing before the undersigned on August 8, 1979 on defendant's demand under MRCrimP 8.03 for a hearing as provided by MRCrimP 11.02 on the admissibility at trial of evidence asserted to be in the hands of the prosecution as set forth in notification given to defendant pursuant of MRCrimP 7.01.

Daniel Bryne, Esq., Assistant Hennepin County Attorney, appeared for and on behalf of plaintiff, and Theodore Collins, Esq., appeared for and on behalf of defendant who also appeared personally.

Prior to the commencement of the hearing defendant moved that so much of Count I and Count II of the Indictment herein which is dated April 3, 1979 and which reads "or with Walter Powers, also known as Eugene Bowers and others" be deleted and stricken from said Indictment and that so much of Count III and Count IV of said Indictment which reads "or others" be stricken and deleted from such counts. The State did not oppose and the Court, on the record, orally granted such motion.

Prior to said hearing the defendant served and filed a "Notice of Additional Defense" wherein he notified the plaintiff that he will "rely upon the defense of entrapment in the event any crime was committed in connection with the facts giving rise to the above proceeding, said defense to be in addition to the defense of not guilty already asserted by the defendant herein" and requested trial of the defense of entrapment by the Court, without a jury, as outlined in *State v. Grilli,* 304 Minn. 80, 95, 230 N.W.2d 445 (1975), and defendant executed a jury waiver on the issue of entrapment which, after approval by the Court, was duly filed herein.

It was agreed by and between counsel that so far as evidence presented at the hearing on the admissibility of evidence was material to the defense of entrapment, the Court should consider such evidence and that such other and further evidence as the defendant wished to present on the defense of entrapment would be presented at the same hearing.

The hearing commenced on August 8, 1979 and continued through August 9 and 10, on which latter date, both sides having rested, counsel made their respective summations to the Court and the Court took the matter under advisement.

Upon all the files, records and proceedings herein, and upon the evidence adduced and the arguments of counsel, the Court finds:

1. Evidence against the defendant seized pursuant to a search warrant was lawfully obtained.

2. Evidence against the defendant procured through electronic or mechanical eavesdropping was lawfully procured.

3. That the defendant was not entrapped into the commission of any offense.

Now, therefore, upon the foregoing Findings of fact, IT IS HEREBY ORDERED:

1. That defendant's defense of entrapment be, and hereby is, denied and dismissed.

2. That the evidence seized pursuant to a search is admissible.

3. That the evidence obtained by electronic or mechanical eavesdropping is admissible.

4. That defendant's motion to suppress the evidence referred to in paragraphs two and three of this order be, and hereby is, denied.

5. That a memorandum in support of the within Findings and Order which will be filed at a later date be made a part hereof upon such filing.

Dated: August 16, 1979.

By the Court:

DOUGLAS K. AMDAHL
Judge of District Court.

(Caption)

MEMORANDUM

This memorandum, although being filed subsequent to the filing of a document entitled, "Order After Omnibus Hearing" is to be made a part of such order.

Dated: August 16, 1979.

DOUGLAS K. AMDAHL
Judge of District Court

MEMORANDUM

The prosecution, pursuant to MRCrimP 7.01 advised the defendant that it had:

1. Evidence obtained as a result of a search, search and seizure, wiretaping, and other forms of electronic and mechanical eavesdropping.

2. Confessions, admissions or statements in the nature of confessions made by the defendant.

3. Evidence discovered as a result of confessions, admissions or statements in the nature of confessions made by the defendant.

And that identification procedures used during the investigation were: Observations of the defendant.

The defendant by a "Motion for Suppression of Evi dence" has demanded a hearing as to the admissibility at trial of any of the evidence specified in the prosecution's notice.

The motion to suppress is based on constitutional grounds, i.e., did the state violate defendant's constitutional rights in the obtaining of the evidence it refers to in its Rule 7.01 notice?

The evidence sought to be suppressed includes evidence seized (defendant's office file relating to claims and settlement thereof, made by defendant on behalf of an undercover officer, to two insurance carriers) pursuant to a search warrant authorized by a judge of this court and conversations between defendant and the undercover officer and recorded either by use of a concealed microphone on the person of the officer or by recording from telephone conversations.

The validity of the search warrant primarily depends upon the contents of the application for such warrant. The application extensively recites portions of the recorded conversations. If the conversations are suppressed, such recited conversations may not properly form a part of the application and the application, without such recited conversations, is insufficient as a basis for the issuance of the search warrant. The application for the warrant is a sufficient basis for the issuance for the warrant if such conversations remain a part of the application. It is thus clear that if the conversations are suppressed, the search warrant is invalid and any evidence seized under it must be suppressed. By the same analogy, if the conversations are not suppressed the search warrant is valid and the evidence seized pursuant to its authority is properly admissible.

Some background is necessary to put the defendant's claims in perspective. The testimony of Sgt. Powers is that law enforcement officers were engaged in an investigation of an alleged insurance fraud. Sgt. Powers, an undercover officer, at some time before such investigation commenced, established an identity as Eugene Bowers and had obtained false identification documents including a Minnesota driver's licence and an auto title certificate in that name and had arranged an intercept by the postoffice for mail addressed to him at the address as shown on the false documents and had a telephone in the Sheriff's office where calls to him were answered in a way so as to maintain the false identification. After the investigation had commenced, Powers arranged, with the help of law enforcement personnel of the city of Edina, for the preparation and execution of a motor vehicle accident report of an accident which had never occurred. The report recited that Powers and a female companion in Powers' automobile were rear-ended by an auto operated by one Barnes (who was an actual person owning an automobile fitting the description of the auto in the accident report and who was a part of the scheme) under circumstances where liability of Barnes was not validly disputable. Powers also obtained, with the help of Hennepin County Welfare Department personnel, a Welfare Department identification card showing him to be qualified for welfare assistance. Powers then went to a doctor who was the subject of the insurance fraud investigation and informed him that he had been in an accident and neither he nor his passenger had been injured but that the other party, who was responsible for the accident, had insisted that Powers and his passenger have a medical examination. Powers asserts that the doctor asked Powers how he wanted to have been hurt and that he would put down whatever Powers wanted to tell him. When Powers told the doctor that he had not in fact been hurt, the doctor told him not to tell the doctor that. On a later visit to the doctor's office a person identified as the doctor's office manager was also informed by Powers that Powers had not been injured. However, the office manager referred Powers to a lawyer for the purpose of making claims against the insurers of Mr. Barnes and of Powers. The attorney to whom Powers was referred was an attorney who Powers believed would recognize Powers and would know that he was an investigator. Powers therefore informed the office manager that he would like to be referred to a different lawyer, and the office manager referred him to the defendant here.

Sgt. Powers, with a female deputy sheriff, reported to defendant's office. There Powers introduced himself as Eugene Bowers and furnished defendant's secretary a copy of the fabricated accident report. At that same time Powers gave the name of State Farm Insurance Company as his insurer and gave defendant the number of the automobile insurance policy. He also provided the defendant with the name of Travelers Insurance Company as the insurer of the other driver in the supposed accident and gave the policy number. The conversation between the female deputy sheriff, Powers and the defendant on that occasion was recorded on tape through a microphone concealed on Powers' body. Other conversations between Powers and defendant both in person and by telephone were also recorded.

Powers asserts that he informed defendant that he, Powers, had not in fact been injured in the accident but that defendant, despite such information, accepted Powers as a client with personal injury and proceeded to make claims against the insurers and eventually settled the claims for several thousand dollars out of which defendant took a fee.

In his negotiation for settlement defendant was aided by a report of hospitalization of Powers under the alias of Bowers at Metropolitan Medical Center (which hospitalization itself was actual but the symptoms and disability leading to the hospitalization were feigned) and that record included a report of an examination by Dr. Joseph Engel who was not the doctor referring the case to Mr. Olkon nor the doctor under investigation. Additionally, the defendant had a medical report from the doctor who was under investigation and a bogus repair bill reciting repairs to the Bowers' automobile. The latter was provided by Powers under his assumed identity as Bowers.

The Eighth Circuit Court of Appeals observations in *U.S. v. McMillan,* 508 F.2d 101, 104 (1974), Certiorari Denied, substantially disposes of the defendant's Fourth Amendment ground for suppression in this language:

> "It is now well settled that a defendant's Fourth Amendment rights are not violated when the defendant's conversations with a government informant are electronically monitored by a government agent with the consent of the informant. E.g., United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (opinion of White, J., in which the Chief Justice and Stewart and Blackmun, JJ. concurred); United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973); United States v. Bishton, 150 U.S. App. D.C. 51, 463 F.2d 887 (1972); United States v. Quintana, 457 F.2d 874 (10th Cir.), cert. denied, 409 U.S. 877, 93 S.Ct. 128, 34 L.Ed.2d 130 (1972); United States v. Holmes, 452 F.2d 249 (7th Cir. 1971), cert. denied, 405 U.S. 1016, 92 S.Ct. 1291, 31 L.Ed.2d 479, 407 U.S. 909, 92 S.Ct. 2433, 32 L.Ed.2d 683 (1972); cf. United

> States v. Skillman, 442 F.2d 542 (8th Cir.), cert. denied, 404 U.S. 833, 92 S.Ct. 82, 30 L.Ed.2d 63 (1971)."

The mere fact that an undercover agent used deception and forged identification and other documents to bring an opportunity before the defendant is not a sufficient foundation on which to base a claim of denial of due process.

In *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) the Court considered an undercover agent who supplied a necessary ingredient for the manufacture of an illegal drug to persons engaged in such manufacture: The observations there made are relevent here:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from involving judicial processes to obtain a conviction, cf Rochin v. California, 342 U.S. 165 (1952), the instant case is distinctly not of that breed. * * * The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment. Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246 (1960).
>
> "The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently

> proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate 'fundamental fairness' or 'shocking to the universal sense of justice,' Kinsella, supra."

So it is here, the use of deception and deceit was made necessary by the nature of the conduct being investigated. The conduct of the undercover officer was neither unreasonable nor extreme, nor did it violate the Fifth Amendment of our Constitution.

Since the Court finds that the conversations between defendant and the undercover agent were not carried out in violation of defendant's constitutional rights, such conversations are admissible and the defendant's motion to suppress them is denied. Furthermore, since the conversations are admissible evidence, the evidence seized under the authority of the search warrant which is based upon the validity of such conversations is also admissible.

For the foregoing reasons the Court has made its order denying defendant's motions to suppress the evidence herein.

Defendant claims that if a crime was committed, that he was entrapped into the commission, and that such entrapment is a bar to further prosecution of the charges here.

The leading United States Supreme Court decisions on the defense of entrapment are *Sorrells v. United States,* 287 U.S. 435, 53 S.Ct. 210, 77 L.ed. 413 (1932); *Sherman v. United States,* 356 U.S. 369, 78 S.Ct. 819, 2 L.ed.2d 848 (1958); and *United States v. Russell* (supra).

The leading Minnesota cases on the defense of entrapment are *State v. Poague,* 245 Minn. 438, 72 N.W.2d 620 (1955) and *State v. Grilli,* 304 Minn. 88, 230 N.W.2d 445 (1975).

In *Sorrells* the United States prohibition agent accompanied by three residents of the county who knew the defendant well visited the defendant's home. He was introduced as a visitor to the area and led the conversation to the World War and the fact that the agent and defendant were former soldiers in the same expeditionary force division. The agent asked defendant if he could get the agent some liquor. Defendant stated that he did not have any. The agent, after further conversation, again asked with the same reply from the defendant. After further wartime experiences had been discussed, the agent asked defendant for a third time to get him some liquor; whereupon defendant left his home and after a few minutes came back with a half gallon of liquor for which the agent paid defendant $5. The agent testified that he was "the first and only person among those present at the time who said anything about securing some liquor."

Chief Justice Hughes found that the defendant had been entrapped, writing:

> "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions.
>
> "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. (Citing cases) The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and

> thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute." (Underlining supplied)

In *Sherman* (supra) a government informer met the defendant at a doctor's office where apparently both were being treated to be cured of narcotics addiction. Several accidental meetings followed, either at the doctor's office or at the pharmacy where both filled their prescriptions from the doctor. From mere greetings, conversation progressed to a discussion of mutual experiences and problems, including their attempts to overcome addiction to narcotics. Finally the informer asked defendant if he knew of a good source of narcotics. He asked defendant to supply him with the source because he was not responding to treatment. From the first, defendant tried to avoid the issue. Not until after a number of repetitions of the request, predicated on the informer's presumed suffering, did petitioner finally acquiesce.

The Court concluded that the entrapment was established as a matter of law, and Chief Justice Warren, in writing the opinion, discussed Sorrells and the predisposition of the defendant therein mentioned in this language:

> "In Sorrells v. United States . . ., this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision.

The function of law enforcement is the prevention of crime and the apprehension of criminals. [Manifestly, that function does not include the manufacturing of crime.] Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' 287 U.S. at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.

"However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials. (Emphasis supplied.) See 287 US, at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own

> conduct and *predisposition*' as bearing on his claim of innocence. See 287 US, at 451." (Emphasis supplied)

In *Russell,* which this Court previously discussed in this memorandum the majority opinion stated:

> "This Court's opinions in Sorrells v. United States, supra, and Sherman v. United States, supra, held that the principal element in the defense of entrapment was the defendant's predisposition to commit the crime. * * *
>
> "We decline to overrule these cases. Sorrells is a precedent of long standing that has already been once reexamined in Sherman and implicitly there reaffirmed. * * *"

And:

> "Sorrells and Sherman both recognize 'that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution,' * * * Nor will the mere fact of deceit defeat a prosecution, see, e.g., Lewis v. United States, 385 U.S. 206, 208-209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."

Minnesota Supreme Court Justice Kelly in *State v. Grilli* (supra) reiterated the definition of entrapment set forth in *State v. Poague* (supra) in this language:

> "The Poague case defined entrapment by setting out the parameters of the defense:
> '* * * The generally recognized principle of entrapment as a defense is well stated in the case of Newman v. United States (4 Cir.) 299 F. 128, 131, as follows:
>
> '* * * When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.'
>
> 'Entrapment exists where it appears that officers of the law lured the accused into committing an offense which he otherwise would not have committed and had no intention of committing. However, the general rule is that it is not unlawful to provide a person with the opportunity to voluntarily and deliberately do what there was reason to believe he would do if afforded the opportunity.' 245 Minn. 443, 72 N.W.2d 624."

Justice Kelly then analyzes the Sorrells, Sherman and Russell cases both from a majority and minority point of view and sums up the majority in this language:

> "In order to decide whether defendant was entrapped, focus must be placed on the necessary elements of

> the defense. The long-established, presently prevailing majority rule associated with the majority opinions in the three United States Supreme Court cases, Sorrells, Sherman, and Russell, has been termed the 'subjective' test. United States v. Russell, 411 U.S. 423, 440, 93 S.Ct. 1637, 1647, 36 L.ed. 2d 366, 378 (Mr. Justice Stewart dissenting). In the majority view, the inquiry on entrapment is concerned primarily with the element of defendant's *predisposition*: whether it was his own original intent to commit the crime charged. The defense must show that the actions of the police went further than those necessary to produce evidence of the defendant's criminality. However, where the state can show the defendant's *'predisposition'* by evidence of a (a) defendant's active solicitation to commit the crime, (b) prior criminal convictions, or (c) prior criminal activity not resulting in conviction * * * or (d) defendant's criminal reputation, *or by any other adequate means the challenged conduct of the state's officers is mitigated or excused*, and the defense of entrapment is not proved . . ." (Underlining supplied)

Justice Frankfurter in his separate opinion in *Sherman* (supra) foresaw the necessity of considering each claim of entrapment on its own merits, or lack thereof, and wrote:

> "What police conduct is to be condemned, because likely to induce those not otherwise ready and willing to commit crime, must be picked out from case to case as new situations arise involving different crimes and new methods of detection. The Sorrells Case involved persistent solicitation in the face of obvious

> reluctance, and appeals to sentiments aroused by reminiscences of experiences as companions in arms in the World War. Particularly reprehensible in the present case was the use of repeated requests to overcome petitioner's hesitancy, coupled with appeals to sympathy based on mutual experiences with narcotics addiction. Evidence of the setting in which the inducement took place is of course highly relevant in judging its likely effect, and the court should also consider the nature of the crime involved, its secrecy and difficulty of detection, and the manner in which the particular criminal business is usually carried on."

Law enforcement officers did not seek out the defendant in our present case. They were engaged in an investigation of other persons, and it was a referral by one of those being investigated which brought the government's agents to the defendant. The undercover officers engaged in no conduct involving persistent solicitation, repeated requests or appeals to sentiment and sympathy in the face of obvious reluctance or hesitancy such as condemned by the Supreme Court decisions, but merely afforded an opportunity to the defendant. The opportunity was offered in defendant's own office, and the defendant was not led; he chose the path. The defendant was not entrapped.

It is not important for the Court's decision here whether a jury, in consideration of the circumstances of the cases brought before them, would find that the defendant had not committed the offenses charged or that he had committed the offenses charged. What is important here is that the state and the defendant have the opportunity to present the facts and circumstances of the case to a jury for a determination.

While this memorandum is to be made a part of the Court's "Order After Omnibus Hearing" which bears the date of August 16, 1979, the memorandum is not being filed with the order on such date because the Court fears that additional publicity would be given to the matter by quotes from the memorandum and that such publicity would affect prospective jurors and thus jury selection procedures. The memorandum will be filed in proper time so that the basis for the Court's order will be known.

AMDAHL, J.

EXHIBIT 3-C DEFT.
[illegible]

HISTORY & PHYSICAL

Bowers, Eugene
472-48-49-07

A321

HISTORY & PHYSICAL

Adm. 8/15/78

Dr. Robert Coifman

DIAGNOSIS: Back and neck sprain

The patient is a 35 year old white male, previously reporting himself to be in generally good health except for chronic and recurrent low grade respiratory infection, who was driving a van with a high back seat (functioning as a head rest) standing at a traffic signal when he was rear-ended by a fast moving full size car early in the morning of 6/16/78. He experienced a general, "shaking up" with no immediate localizing symptoms, though on examination he had muscle spasm in the left trapezius area and pain and tenderness and a positive right straight leg raising sign with localization to the right sacroiliac area. Within 3 days there was also paresthesia at the same site, decreased sensitivity to pinprick, but not to light touch. By 4 days post-injury there were cervical findings, left high levator scapuli trigger point, and treatment was started with Indomethocin 25mg t.i.d. increasing to 50mg t.i.d. The muscle spasm responded nicely to hypnotherapy by operator and the patient rapidly learned to give himself relief at home via self-hypnosis as well. GI intolerance led to replacement of Indomethocin by Tolectin early in July, 1978, and following a generalized flair in symptoms after an attempt at water skiing(in which the patient had excelled prior to his injury) and exacerbation and symptoms responded to a program of Williams and back strengthening exercises, swimming for relaxation and exercises, hypnotherapy, and medications as above. There was a general exacerbation in muscle tension between August 3 and 10 in association with increasing nervous tension. The patient states in association with anxiety about his ability to return to work, and a major exacerbation with appearance of new trigger points and gross enlargement of the area of back pain and paresthesia followed a relatively trivial physical injury on 8/12/78. Norflex was prescribed on 8/10 and has not yet been obtained by 8/14 and because of the extreme degree of pain and muscle spasm with increased radicular findings, the patient is being admitted for intensive in-patient physical therapy and rest. In addition to the back findings which are detailed on the neurologic and articular record forms the patient has left superspinatous tendonitis and spasm of the muscle as well. Cervical spine films were negative and lumbosacral spine showed mild degenerative changes with slight straightening at the L2-3, and L3-4 levels, though with normal disc spaces. X-rays are being ordered of the left shoulder. Initial physical therapy is to include Hubbard tank and hot packs with massage, review of body mechanics and Williams back and neck strengthing exercises. Treatment is to include Tolectin and Norflex.

Admission CBC and multichemistry profile done in the office and is pending. Urinalysis Ph 6.0, specific gravity 1.026, dipstix negative, micro was negative. The patient has history of slight elevation of cholesterol (225) in May, 1978, dropping to 201 by mid June following instruction in dietary modification and allergy work up because of the recurrent respiratory infections demonstrated sensitivity to helminthosporium, for which the patient was instructed on mold avoidance precautions.

R Coifman

Robert Coifman, M.D.

RC/pj
D 8/14/78 #7
T 8/15/78

Metropolitan Medical Center

768-072 (60-33724)

HISTORY & PHYSICAL

PREVIOUS PAGE WAS BLANK

ARTICULAR INFLAM. FLOW SHEET, p. 2a (narrative/abn'l ROM/inflam)	Name: Evgene Bowers	#: - -		b.
Date/provider:	3 Aug 78	10 Aug 78	14 Aug 78	16 Aug 78
Tx:	→ no meds	→	Out/Talwin	Talwin weight
		R Norflex 100mg bid	– did not fill	Norflex weight
Systemic: Lym, CV. liver, spl, fever, eyes, Σ funct'n:				
T-M R				
T-M L				
Neck		[illegible]	[illegible]	[illegible]
Shoulders R				
Shoulders L			[illegible]	
Elbows R				
Elbows L				
Wrist joint R				
ext. tendon R				
Wrist joint L				
ext. tendon L				
Hands:		[illegible]	[illegible]	[illegible]
Back:				
Hips (R/L) Ab				
Ad				
F				
E				
In				
Ex				
		R/L ± /–	R/L – /–	[illegible]
Knee R			R S2	[illegible]
Knee L				
Ankle med R				[illegible]
lat R				
Ankle med L				
lat L				
MTP R				
MTP L				

S) Ran out/ Talwin – no [illegible] c/o pain in [illegible] to self-hypno
O) no [illegible] Hypno: [illegible]

S) ↑ tight [illegible] for [illegible] – tense [illegible] w/ ability to work. O) ↑ tight, [illegible] Standing/ ↑ slouch ([illegible]) A) Discomfort [illegible] P) Hypno ⇒ ↑↑ relax, little [illegible]
P) Rel to [illegible] [illegible] Consider [illegible] PT, Resistant muscles.

S) 2 days ago [illegible] attacked by [illegible] on street [illegible] "roughed up". [illegible] A) [illegible] Still / slouch good. [illegible] P) Hypo, [illegible] Talwin, PT [illegible]

S) Still ↑↑ still sore; [illegible] improved O) [illegible] A) Still ↑↑ sore P) Hypno ⇒ ↑↑ musc. relax
R: Talwin [illegible]

FORM D1-953-13
S=Soft tiss. A=Acute; C=Chron. synov. E=Effus. P=Pain/wt or mvt. H=Hot T=Tender D=Structural deformity √=no change

ARTICULAR INFLAM. FLOW SHEET, p. 2b Name: [illegible]
(narrative/abn'l ROM/inflam) #: - - b.

Date/provider:	17 Aug 78 Cot	16 Aug	19 Aug 78	24 Aug 78
Tx:	Tolectin 800 mg x2 tid	→ [illegible] qid	Tolectin 800 mg x2 qid	→
	Norflex 100 mg hs	→	→	→
Systemic: Lym, CV. liver, spl, fever, eyes, Σ funct'n:				
T-M R				
L				
Neck	per usual	no TP no Δ	slt ↓ in lso	Rt hm [illegible] L [illegible] cap JP's, mobility, Tend
Shoulders R				
L				
Elbows R				
L				
Wrist joint R				
ext. tendon R				
Wrist joint L				
ext. tendon L				
Hands:	per usual	inter-seg [illegible] ⌀	R lumb Sgmt persists	R lumb w. sprm - pain persists
	SLR		SLR	SLR -/-
	R/L [illegible] -/-		R/L [illegible] -/-	Rev lt Sgm
Back:	Back Sgm	R lu Sgm	R.u. Sgm	R/L [illegible] /-
	R/L [illegible] +/+	R/L [illegible] +/+	R/L [illegible] +/-	no Δ
	i-lat SI [illegible]	mid-lumb	slt wid + Ⓡ lumb	mut [illegible]
	low lumb [illegible]	pull [illegible]	P-8 P-2	turning
	pain	but [illegible]	∠ pain	om [illegible]
Hips (R/L) Ab	Ⓡ pain persists	dull than	pain persists	pain /
Ad		yesterday	but [illegible]	this [illegible]
F		pain persists	↓/[illegible]	
E			to single	
In			Seg [illegible] T-11	
Ex				
Knee R				
L				
Ankle med R				
lat R				
Ankle med L				
lat L				
MTP R				
L				

3) though more relaxed ② [illegible] + [illegible] (cause hypnos) ④ Keep walk ⑤ to work / self-hypnosis [illegible]

Ⓛ hi TP unchanged, hi persists hypno can't [illegible] ⇒ 1° [illegible] hi back relax
P Tolectin for low back radiculitis Sx

3) Back [illegible] Tolectin ③ [illegible] ④ hypnosis ⑤ for pain [illegible] PT

1) [illegible] ③ [illegible] / hypno ④ Slt [illegible] / [illegible] + ? nerve compression Ⓛ lumb
2) [illegible] ? EMG R lumb.

Structural ✓=no change
Soft tiss: A=Acute; C=Chron. synov. E=Effus. Pain/ Part of mvt. Hellot I=Tender D=Deformity
[illegible] 01-953 13

ARTICULAR INFLAM. FLOW SHEET, p. 3c Name: [illegible]
(narrative/abn'l ROM/inflam) #: - - b.

Date/provider:	21 Aug 98 · Cov
Tx:	Tolectin 200mg 3 tabs qid
	Naprosyn 100mg bid
Systemic:Lym,CV. liver,spl,fever, eyes, Σ funct'n:	
T-M R	
L	
Neck	ROM improved per [illegible]
Shoulders R	
L	
Elbows R	
L	
Wrist joint R	
ext. tendon R	
Wrist joint L	
ext. tendon L	
Hands:	Hsg much improved per [illegible] (R) 7-11 paresthesia persist!
Back:	SLR R/L 30/30 -/- Knee to face R/L 15/15 -/-
Hips (R/L) Ab	
Ad	
F	
E	
In	
Ex	
Knee R	
L	
Ankle med R	
lat R	
Ankle med L	
lat L	
MTP R	
L	

S) 70% better pain mg O) Posture much straighter A) Much improved P) Cont [illegible] & back strengthening exercises at home & will [illegible]. [illegible] doing so well will not require hosp PT; no present
Cont meds, rtc/1wk

FORM D1-963-13

S=Soft tiss. A=Acute; C=Chron. synov. E=Effus, P=Pain/wt or mvt. H=Hot T=Tender D=Structural deformity ✓=no change

A-79

[illegible] [illegible] 17 Aug 78
B) 19 Aug 78. [illegible] [illegible] [illegible] – [illegible] NAD
CJ 21 Aug 78.

R	CRANIAL NERVES	L
	I	
	SMELL	
	II	
	VISION	
	FIELD (Confrontation)	
	FUNDUS	
	III-IV-VI	
	PTOSIS	
	Diplopia	

OCULAR MOVEMENTS
R L

NYSTAGMUS
R. eye L. eye
Record nystagmus by arrows

R	PUPILS	L
	Size-Shape	
	REFLEXES	
	Light	
	Convergence	

R		L
	V	
	Corneals	
	Face	
	Jaw Muscles	
	VII	
	Symmetry	
	Weakness	
	VIII	
	Hearing	
	Weber	
	Rinne	
	IX-X	
	Palate	
	Reflex	
	XII	
	Tongue	

Intellect

Speech
Handedness
Dysphasia
Dysarthria
Dysphonia

R Strength	MUSCLES N, -1, -2, -3, -4		L Strength
	Ext. rotat. (suprascap.)	C 56	
	Pector. maj. (pector.)	C5-T1	
	Deltoid (axill.)	C 56	
	Biceps, Brach. (musculocut.)	C 56	
	Triceps (radial)	C 678	
	Wrist ext. (radial)	C 678	
	Wrist flex. (med. & uln.)	C 678 T1	
	Digit ext. (radial)	C 78	
	Digit flex. (med. & uln.)	C 78 T1	
	Thenar (med.)	C 8 T1	
	Hypothenar (uln.)	C 8 T1	
	Interossei (uln.)	C 8 T1	
	Abdomen	T6-L1	
	Rectal sphinct.	S 34	
	Iliopsoas (femor.)	L 234	
	Adduct. thigh (obtur.)	L 234	
	Abduct. thigh (sup. glut.)	L 45 S1	
	Gluteus max. (inf. glut.)	L 5 S12	
	Quadriceps (femor.)	L 234	
	Hamstrings (sciat.)	L 45 S1	
	Anter. tibial (peron.)	L 45	
	Toe ext. (peron.)	L 45 S1	
	Peronei (peron.)	L 5 S1	
	Post. tibial (tib.)	L 5 S1	
	Toe flex. (tib.)	L 5 S1	
	Gastroc. Soleus (tib.)	L 5 S12	

(Circle the Appropriate)
Spasm, Spasticity, Rigidity, Cogwheel, Hypotonia, Myotonic reaction, Involuntary movement, Tenderness, Consistency, Contracture, Wasting.

R	REFLEXES	L
	Jaw Cr. V.	
	Biceps C56	
	Brachioradialis C56	
	Triceps C678	
	Hoffmann	
	Epigastric T6-9	
	Hypogastric T11-L1	
	Knee L34	
	Ankle S12	

N = normal
-1 = hypoactive
-2 = hypoactive
-3 = absent
+1 = increased
+2 = unsustained clonus
+3 = sustained clonus

R	PLANTAR	L
	Flex	
	Ext	

Stance
Gait
Tandem
Romberg

SPINE MOTION

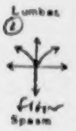
R L

Cervical

Spasm

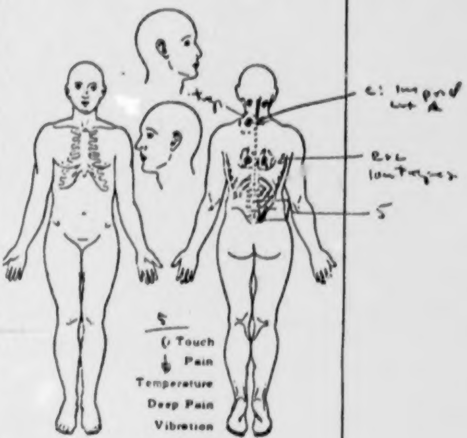
R L

Lumbar



flexion
Spasm

SENSATION
(underline if normal – otherwise encircle and chart)



5
Touch
Pain
Temperature
Deep Pain
Vibration
Joint Sense
Stereognosis
Traced Figures
Two Point

COORDINATION
(eyes open)
Nose-Finger-Nose
Knee Pat (pro -sup.)
Toe-Finger
(eyes closed)
Finger-Nose
Heel-Knee

BLOOD PRESSURE
R L

R	ARTERIES	L	R	BRUIT	L
	Temporal			Cranial	
	Carotid			Orbital	
	Radial			Cervical	
	Dors. ped.			Subclavian	
	Tibial				

ADDITIONAL COMMENTS
①. [illegible] [illegible] [illegible] spasm
① [illegible] [illegible] [illegible] / [illegible] Ⓡ [illegible] [illegible]

, M.D.

A-80

METROPOLITAN MEDICAL CENTER
DEPARTMENT OF RADIOLOGY
900 South Eighth Street Minneapolis, Minnesota 55404
Telephone 612/347-4213

XRAY REPORT

8-15-78

NAME POWERS EUGENE -- A321-1
BIRTHDAY 00025-3 8-15-78
DOCTOR DR R COIFMAN 9-25-42 35
SOC. SEC. 472-48-49-07

CHEST

NEgative.

bg 8-16-78

S.D. LAXDAL, MD

Stefan D. Laxdal

723-011
4/78 (60-37485)

PATIENTS MEDICAL RECORD

X-RAY

METROPOLITAN MEDICAL CENTER
DEPARTMENT OF RADIOLOGY
900 South Eighth Street Minneapolis, Minnesota 55404
Telephone 612/347-4213

XRAY REPORT

NAME [illegible]
BIRTHDAY [illegible]
DOCTOR 8-16-78
SOC. SEC. #

LEFT SHOULDER AND ACROMIOCLAVICULAR JOINTS

AC-joints were studied with and without weight bearing and showed no significant difference in the appearance of either AC-joint with and without weight bearing. There is only slight elevation of the lateral end of each clavicle which is also symmetrical and of questionable significance. The shoulder is otherwise unremarkable.

IMPRESSION: There is no good evidence for separation of the acromioclavicular joint on either side.

bg 8-17-78

S.D. LAXDAL, MD

Stefan D. Laxdal

X-RAY

723-011
8/76 (60-37485)

PATIENTS MEDICAL RECORD

IMPORTANT, PLEASE READ. MEDICAL ASSISTANCE HAS PAID THE FOLLOWING BILLS FOR YOU. PLEASE CIRCLE ANY SERVICES YOU DID NOT RECEIVE. FOLD, SEAL, AND PLACE THIS FORM IN THE MAIL. NO POSTAGE STAMP IS NECESSARY. (SEE ADDITIONAL INSTRUCTIONS ON BACK SIDE)

THIS IS NOT A BILL

NAME **BOWERS** **EUGENE** **1178** I.D. NUMBER **27-5-000-040-4112-1**

PROVIDER NAME	DATE OF SERVICE	PSN	DESCRIPTION OF SERVICE	AMOUNT	C.C.N. (STATE USE ONLY)
METROPOLITAN MEDICAL	08/24/78	01	INPATIENT HOSP. SERV.	$1238.06	26905208223
METROPOLITAN MEDICAL	07/10/78	01	OUTPATIENT HOSPITAL	$113.00	27006106879
METRO RADIOLOGICAL C	08/15/78	01	RADIOLOGY / X-RAY	$5.40	2680400703801
METRO RADIOLOGICAL C	08/16/78	01	RADIOLOGY / X-RAY	$20.30	2680400703802
METRO RADIOLOGICAL C	08/16/78	01	RADIOLOGY / X-RAY	$6.90	2680400703803

FOLD | HERE

FOLD | HERE

FOLD IN HALF - MOISTEN TOP PORTION AND SEAL.

DPW 1851
(4-77)

HENNEPIN WELFARE DEPT.
400 SOUTH 5TH STREET 160000
MINNEAPOLIS MN 55415

0040209

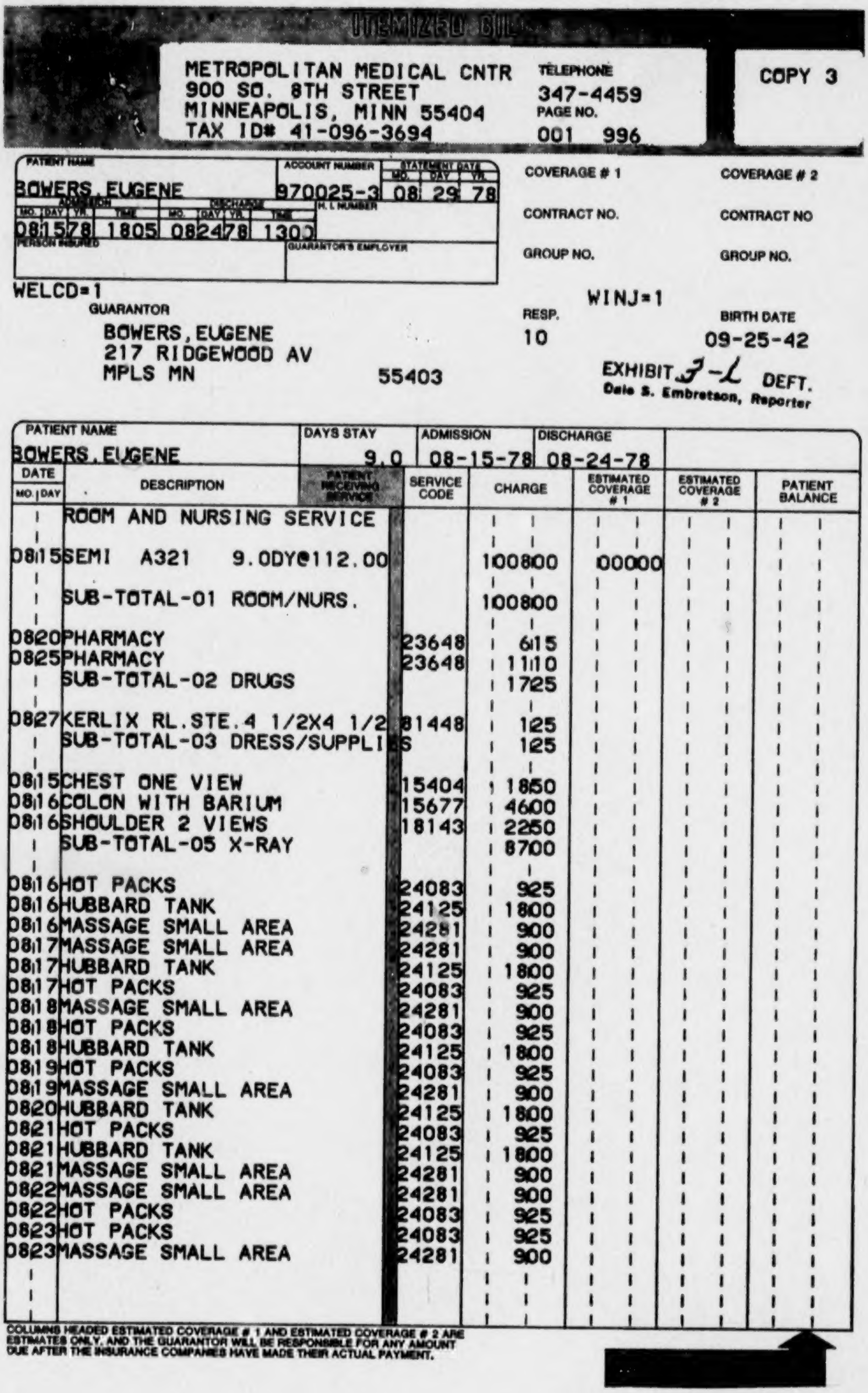
CUT ALONG THIS LINE

METRO RADIOLOGICAL C	07/10/78	01	RADIOLOGY / X-RAY	$6.00	2120470694301
METRO RADIOLOGICAL C	07/10/78	01	RADIOLOGY / X-RAY	$8.00	2120470694302
METRO RADIOLOGICAL C	07/10/78	01	RADIOLOGY / X-RAY	$6.00	2120470694303

FOLD HERE

FOLD IN HALF - MOISTEN TOP PORTION AND SEAL.

DPW 1851
(4-77)



ITEMIZED BILL

METROPOLITAN MEDICAL CNTR
900 SO. 8TH STREET
MINNEAPOLIS, MINN 55404
TAX ID# 41-096-3694

TELEPHONE
347-4459
PAGE NO.
001 996

COPY 3

PATIENT NAME BOWERS, EUGENE	ACCOUNT NUMBER 970025-3	STATEMENT DATE MO. DAY YR. 08 29 78	
ADMISSION MO. DAY YR. TIME 08 15 78 1805	DISCHARGE MO. DAY YR. TIME 08 24 78 1300	H. I. NUMBER	
PERSON INSURED	GUARANTOR'S EMPLOYER		

COVERAGE # 1
CONTRACT NO.
GROUP NO.

COVERAGE # 2
CONTRACT NO
GROUP NO.

WELCD=1

WINJ=1

GUARANTOR
BOWERS, EUGENE
217 RIDGEWOOD AV
MPLS MN 55403

RESP.
10

BIRTH DATE
09-25-42

EXHIBIT 3-L DEFT.
Dale S. Embretson, Reporter

PATIENT NAME	DAYS STAY	ADMISSION	DISCHARGE
BOWERS, EUGENE	9.0	08-15-78	08-24-78

DATE MO.	DATE DAY	DESCRIPTION	PATIENT RECEIVING SERVICE	SERVICE CODE	CHARGE	ESTIMATED COVERAGE # 1	ESTIMATED COVERAGE # 2	PATIENT BALANCE
		ROOM AND NURSING SERVICE						
08	15	SEMI A321 9.0DY@112.00			100800	00000		
		SUB-TOTAL-01 ROOM/NURS.			100800			
08	20	PHARMACY		23648	615			
08	25	PHARMACY		23648	1110			
		SUB-TOTAL-02 DRUGS			1725			
08	27	KERLIX RL.STE.4 1/2X4 1/2		81448	125			
		SUB-TOTAL-03 DRESS/SUPPLIES			125			
08	15	CHEST ONE VIEW		15404	1850			
08	16	COLON WITH BARIUM		15677	4600			
08	16	SHOULDER 2 VIEWS		18143	2250			
		SUB-TOTAL-05 X-RAY			8700			
08	16	HOT PACKS		24083	925			
08	16	HUBBARD TANK		24125	1800			
08	16	MASSAGE SMALL AREA		24281	900			
08	17	MASSAGE SMALL AREA		24281	900			
08	17	HUBBARD TANK		24125	1800			
08	17	HOT PACKS		24083	925			
08	18	MASSAGE SMALL AREA		24281	900			
08	18	HOT PACKS		24083	925			
08	18	HUBBARD TANK		24125	1800			
08	19	HOT PACKS		24083	925			
08	19	MASSAGE SMALL AREA		24281	900			
08	20	HUBBARD TANK		24125	1800			
08	21	HOT PACKS		24083	925			
08	21	HUBBARD TANK		24125	1800			
08	21	MASSAGE SMALL AREA		24281	900			
08	22	MASSAGE SMALL AREA		24281	900			
08	22	HOT PACKS		24083	925			
08	23	HOT PACKS		24083	925			
08	23	MASSAGE SMALL AREA		24281	900			

COLUMNS HEADED ESTIMATED COVERAGE # 1 AND ESTIMATED COVERAGE # 2 ARE ESTIMATES ONLY, AND THE GUARANTOR WILL BE RESPONSIBLE FOR ANY AMOUNT DUE AFTER THE INSURANCE COMPANIES HAVE MADE THEIR ACTUAL PAYMENT.

ITEMIZED BILL

METROPOLITAN MEDICAL CNTR
900 SO. 8TH STREET
MINNEAPOLIS, MINN 55404
TAX ID# 41-096-3694

TELEPHONE
347-4459
PAGE NO.
002 996

COPY 3

PATIENT NAME	ACCOUNT NUMBER	STATEMENT DATE MO.	DAY	YR.
BOWERS,EUGENE	970025-3	08	29	78

ADMISSION MO.	DAY	YR.	TIME	DISCHARGE MO.	DAY	YR.	TIME	H. I. NUMBER
08	15	78	1805	08	24	78	1300	

PERSON INSURED
GUARANTOR'S EMPLOYER

COVERAGE # 1	COVERAGE # 2
CONTRACT NO.	CONTRACT NO
GROUP NO.	GROUP NO.

WELCD=1
WINJ=1

GUARANTOR
BOWERS,EUGENE
217 RIDGEWOOD AV
MPLS MN 55403

RESP.
10

BIRTH DATE
09-25-42

PATIENT NAME	DAYS STAY	ADMISSION	DISCHARGE
BOWERS,EUGENE	9.0	08-15-78	08-24-78

DATE MO. DAY	DESCRIPTION	PATIENT RECEIVING SERVICE	SERVICE CODE	CHARGE	ESTIMATED COVERAGE # 1	ESTIMATED COVERAGE # 2	PATIENT BALANCE
	SUB-TOTAL-08 OTHER SE			217 75			
0823	TELEVISION RENTAL		25254	15 75			
	SUB-TOTAL-09 MISC			15 75			
	** TOTAL CHARGES **			1347 00			
0823	PAY-03 BOWERS,EUGENE			15 75-			
	** TOTAL **			1331 25			

COLUMNS HEADED ESTIMATED COVERAGE # 1 AND ESTIMATED COVERAGE # 2 ARE ESTIMATES ONLY, AND THE GUARANTOR WILL BE RESPONSIBLE FOR ANY AMOUNT DUE AFTER THE INSURANCE COMPANIES HAVE MADE THEIR ACTUAL PAYMENT.

No. 80-878

Supreme Court, U.S.
FILED
DEC 24 1980
[illegible]

IN THE

Supreme Court of the United States

October Term, 1980

ELLIS OLKON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Should the United States Supreme Court grant a Writ of Certiorari to the Supreme Court of Minnesota when the state court has correctly applied the long-standing and settled law of this Court?

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IN THE

Supreme Court of the United States

October Term, 1980

ELLIS OLKON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

[Abstract of the statement of facts in majority opinion of *State v. Olkon,* —— N.W.2d —— (dec. August 29, 1980) Reprinted in Petitioner's Appendix A-2 through 22.]

In the winter of 1978 a Deputy of the Hennepin County Sheriff's Narcotics Division began an undercover investigation of medical and welfare fraud. In the course of his duties he visited a suspect, Dr. Robert Coifman, and complained of a sore throat and a stuffy nose. He received treatment from Dr. Coifman for various allergies and became known to Dr. Coifman as a regular patient. During these undercover operations with Dr. Coifman, Deputy Powers used the cover name of "Eugene Bowers". He continued to use this name in his subsequent investigation of a Minneapolis attorney, one Ellis Olkon, Petitioner herein. On two of "Bowers' " visits to Dr. Coifman, he was accompanied by Deputy Sheriff, Pam Lavarre, who throughout used the cover name of "Elizabeth Saunders" and posed as "Bowers' " girlfriend.

Prior to "Bowers' " and "Saunders' " visits to Dr. Coifman the Hennepin County Sheriff's Department had prepared their agents with the necessary "tools" for their undercover activity. "Bowers" was issued a false driver's license. He carried a false Hennepin County Welfare Assistance Card. With the cooperation of the Edina Police Department, a phony police report was prepared on a Minnesota Department of Public Safety accident form which showed that "Bowers" and "Saunders" had been rear ended by another auto in Edina at 1:10 a.m. on June 16, 1980. "Bowers" was furnished a fake repair bill on a 1977 Ford Van with "Bowers" listed as owner, in the amount of $313.60. At the request of the Hennepin County Sheriff's Department and the Insurance Crime Prevention Institute, State Farm Mutual Insurance Company provided automobile coverage and personal insurance protection for "Bowers". The Travelers Insurance Company provided a liability policy on the driver of the vehicle that had rear ended "Bowers." These arrangements were made in April of 1978, as an aid to authorities in their investigation of suspects Dr. Coifman and his business manager, Nathan Neff. "Bowers" was equipped with a small body transmitter and receiver, which recorded telephonic and personal conversations. He used this device throughout his investigation of Dr. Coifman, Nathan Neff and, later Petitioner.

On June 16, 1978, "Bowers" and "Saunders" visited Dr. Coifman, ". . . with the story that we had been involved in an accident in the early morning hours of that day." "Bowers" complained of "lower back pain" and was given no treatment on that visit nor on his next visit of June 19, 1978. Dr. Coifman, "Bowers", and Coifman's business manager, Nathan Neff, discussed the possibility of a neck brace and hospital treatment for "Bowers". On June 20, 1978, "Bowers" and "Saunders" returned to Dr. Coifman's[1] office. They received no treatment, but Nathan Neff gave "Bowers" the name of a Minneapolis lawyer whom he thought would process his claim. Subsequently, "Bowers" rejected that attorney ("Bowers" thought he would be recognized) but asked Neff for the name of another attorney who would handle the claim. Nathan Neff[2] gave "Bowers" Petitioner's name who was at that time a practicing attorney in the city of Minneapolis.

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[1] On October 16, 1979, Dr. Coifman pled guilty to three counts of attempted theft-by-swindle and one count of Medical Assistance Fraud for his part in these events. (Hennepin County District Court, Fourth Judicial District of Minnesota, File No. 72573-2.)

[2] On December 13, 1979, Nathan Neff was found guilty by a jury of 14 counts of fraud crimes including five counts of Medical Assistance Fraud for his part in these events. (Hennepin County District Court, Fourth Judicial District of Minnesota, File No. 72573-1.)

On June 22, 1978, "Bowers" called Petitioner's secretary and received an appointment to see Petitioner at his office on June 26, 1978. When "Bowers" and "Saunders" arrived at Petitioner's office on June 26, 1978, Petitioner's secretary had them execute medical release forms and legal retainer agreements. These were signed before they saw Petitioner. "Bowers" wore a soft collar neck brace that day. The recordings of their conversations were played to the jury and typed as an aid to the jury while they listened to the tapes.[3] Petitioner was told by "Bowers" from the start that he was not injured in the alleged accident of June 16, 1978. The initial conversation was:

> ["O" represents Petitioner; "P" represents "Bowers".]
>
> O: You don't look sick. But with Coifman on, anybody's sick. Is something really wrong with you?
>
> P: *Ah, well, not really. But they decided that I should ah—that I maybe I could get something out of it. So they said I should come and see ya.*
>
> O: Well, I don't want to know anything about that.
>
> P: Then I won't tell you anything about that!
>
> (*State v. Olkon*, —— N.W.2d ——, (dec. August 29, 1980.) Pet. Cert. p. 6. Emphasis added.)

In the first meeting between Petitioner and "Bowers", Petitioner expressed his misgivings concerning Dr. Coifman but said to "Bowers", "I guess I don't want to look a gift horse in the mouth." (*Id.* at A-7.)

Subsequent to this first meeting Petitioner notified the Travelers Insurance Company that a possible cause of action existed against them for the June 16 accident in favor of his client, "Bowers". Petitioner informed State Farm Mutual that they were to deal directly with "Bowers". Petitioner forwarded the accident report and repair bill to the respective insurance companies.

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[3] The transcripts of the tape were played to the jury pursuant to *U.S. v. McMillan*, 508 F.2d 101 (8th Cir. 1974) *cert. denied* 421 U.S. 916 (1975).

The Hennepin County Medical Society, who had been investigating Dr. Coifman, at the urging of the Hennepin County Sheriff's Department, delayed the filing of charges against Dr. Coifman for about thirty days. Dr. Coifman's expulsion from the Hennepin County Medical Society, became final on August 31, 1978. Until that date he was considered as a member in good standing. At the request of Petitioner, his secretary phoned the Hennepin County Medical Society in March of 1978 inquiring if they had any complaint on Dr. Coifman's overcharging for services. She was informed that he was a member in good standing and told to call other doctors for fee quotations. In early July of 1978 she called the society again raising the same questions and receiving essentially the same answer.

"Bowers" was admitted to Metropolitan Medical Center by Dr. Coifman, on August 15, 1978, and released on August 24, 1978. While in the hospital he underwent various forms of therapy treatment and was also examined by Dr. Joseph Engel, a consulting physiatrist. Dr. Engel reported to State Farm Mutual, "Bowers" " no fault insurance carrier, that ". . . there was a mild condition that he had and this involved a complaint of his lower back and of his neck". He reported to State Farm Mutual that it was "too early to indicate" any permanency. Dr. Engel also submitted a consultation report.

"Bowers" had no contact with Petitioner after June 26, 1978, until he went to Petitioner's office alone on September 1, 1978. At that time "Bowers" indicated to Petitioner that he had been in the hospital for ten days ". . . and fooled every one in the hospital. . . ." Petitioner responded:

> Well that's good, they'll have good medical records, and good medical, ah ya know—but that's not still showing that you're not going to completely heal and have nothing wrong with you two years from now.
> (*State v. Olkon, supra.* Pet. Cert. A-33).

On December 15, 1978, "Bowers" carried a medical report from Dr. Coifman to Petitioner. Petitioner was very upset at the medical report because it did not specify the part of the body that indicated permanent disability. Petitioner offered to try to get a new report from Dr. Coifman. (He later suggested an amended report.) Petitioner and "Bowers" discussed this problem as follows:

> ["O" represents Petitioner; "P" represents "Bowers".]
>
> O: I don't like the report, it's the second time I've told Coifman, you know that, you, say 20 to 25 percent disabled, but they have to name the goddamn part of the body that's disabled. Not disabled because this injury prevents him from returning to gainful employment * * *
>
> * * * *
>
> O: I mean, what he's saying is that there's nothing wrong with you. That's what he's saying. Ah, I can try to settle it with this, but it's not worth the kind of money that he could have—if he's said 20 to 25 percent of the back, the neck, legs, arms, ah—I don't know what the hell's wrong with him. Ya know Neff tells me this is only gonna help you—this doesn't help you.
>
> P: Yeah?
>
> O: Back and neck sprain. Well, —ah—do you want to have him do a new report? Fine. Or I can just send this one out, and try to get something for it.
>
> O: Nathan—you know the least they could do is come up with a hell of a better report than this. The thing is—

> you know—he's protecting his ass. It doesn't help if he doesn't say you have a permanent injury, it just says you have 20 to 25 percent disabled, because of the classification of the type of work that you do, that you do manual labor. That doesn't impress State Farm. That doesn't make sense whether you're working or not. He says you have a 20 to 25 percent permanent partial injury of a certain part of your body. That's what would be most beneficial.
>
> P: Well, let's see, why don't we see what the insurance companies will say. Will they make an offer, or will you have to—
>
> (*State v. Olkon, supra.* Pet. Cert. A-14.)

Petitioner sent all medical reports and bills to the Travelers and State Farm Insurance Companies and on December 20, 1978, they notified Petitioner that they would be willing to settle. Petitioner negotiated Dr. Coifman's bill to a lower amount from $3,850 to $1,865.50. This lesser amount, however, was not disclosed to the Travelers Insurance Company. Petitioner settled the case for $7,315.60 from Travelers Insurance Company and $4,897.60 from State Farm Mutual. Petitioner retained $1,538 from these amounts in case the Hennepin County Welfare Department would file a lien because they had paid that amount of "Bowers' " medical costs.

On a number of occasions, "Bowers" indicated to Petitioner that he was uneasy about filing these claims and wondered if the insurance companies would investigate or if he would get caught. He was assured by Petitioner that he had nothing to worry about because the case was closed after payment. He told "Bowers" that neither Dr. Coifman nor anyone else would be in a position to complain. "Bowers" and Petitioner discussed this problem in part as follows:

[“O” represents Petitioner; “P” represents “Bowers”.]

P: Okay, I’ve heard stories now about insurance investigators following people around to find out if they were really hurt. Am I going to have to watch out?

O: Your case is over. Your case.

P: Okay, I don’t * * * Okay, it doesn’t make any difference if * * *

O: Because if you don’t * * *

O: The only problem you’ve got is from welfare or from Coifman. That’s the only problem you’ve got. You say that Coifman * * *

P: Coifman, Coifman ain’t gonna argue with this because he knows that * * *

O: You told me that he didn’t do half the work that he said he did.

P: * * * He knows he didn’t, get [sic] knows *that I wasn’t hurt right from the get-go.*

O: *Okay, I know that, you told me that, and that’s why I settled for what you asked me to settle for* * * *

O: and there’s isn’t any two ways about it, that’s ah * * *

P: He’s not going to argue about that.

O: That, that, I’ve got certain risks here and my risks are if welfare comes I’ve got to pay them. That’s what I’m holding the money for.

P: Okay.

O: I’m writing the letter the way I’m writing it, ya know, to protect myself. I don’t trust Neff.

P: Well, Neff, Neff ain’t going to say nothing’s either because * * * I walk in the office and tell him that I wasn’t hurt in the accident and Coifman asks me how bad do I want to have been hurt.

> **O:** Ya.
>
> **P:** He ain't gonna argue with this.
>
> **O:** I don't like to hear you tell me that. I don't even want to know that.
>
> **P:** All right. I didn't tell you that.
>
> (*State v. Olkon, supra.* Pet. Cert. A-17, 18. Emphasis added.)

"Bowers" told Petitioner that if he (Petitioner) wanted to withdraw from his representation he could do so:

> ["P" refers to Bowers.]
>
> **P:** Because, ah—as a matter of fact I would say that if—if you're worried about me, maybe you should—*maybe I should go find some other attorney*—if—ah—I mean they're sure not gonna.
>
> * * *
>
> **P:** Sure. And after you check that over, *and decide you don't want me around,* just let me know.
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> (*State v. Olkon, supra.* Pet. Cert. A-40. Emphasis supplied by the court.)

In a conversation on December 21, 1978, Petitioner advised "Bowers" that he should not have another accident for five years:

> ["P" refers to Bowers and "O" refers to Petitioner.]
>
> **P:** Well, ah, if I get in any trouble or anything I'll give you a call. And maybe you can help me out there.
>
> **O:** He's not going to give you any problems.
>
> **P:** No, I don't mean that, I mean if ever I get in any trouble or some, well, maybe I'll have an accident next year. This is an easy way to make some money.
>
> **O:** Well, but they're going to know you have a preexisting claim now.

P: Ya, that's true.

O: Ya, but it's not an easy way * * *

P: You couldn't do that, too often, I suppose.

O: No.

P: Aggravate * * *

O: You went in the hospital, ah, the hospital's gonna have records now Coifman's put things there.

P: Yeah.

O: Ah, people have accidents several times a year, but, ah, it doesn't work after the first one if it's too often. *You shouldn't have another one for five years if you want to make money.*

(*State v. Olkon, supra*. Pet. Cert. A-20. Emphasis added.)

On January 14, 1979, a search warrant was executed at Dr. Coifman's office and his files seized. On January 17, 1979, a search warrant was executed at Petitioner's office and all his files in conjunction with this case were seized. Petitioner was charged with two counts of conspiracy to commit theft-by-swindle over $2,500 and two counts of attempted theft-by-swindle over $2,500.[4] In accordance with Minnesota Procedure, Petitioner elected to waive a jury trial on the defense of entrapment. Evidence was heard and decided by the trial court against him. (Trial court's Order and Memorandum dated August 16, 1979. Pet. Cert. A-56-73.)

Petitioner was found guilty by the jury of two counts of attempted theft-by-swindle on December 20, 1979. Petitioner appealed his conviction to the Minnesota Supreme Court. Oral argument was heard on May 27, 1980. On August 29, 1980, the Minnesota Supreme Court, in a 6 to 2 decision affirmed Petitioner's conviction. On September 29, 1980, the Minnesota Supreme Court denied Petitioner's Petition for Reargument.

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[4] "The indictment against defendant originally alleged a conspiracy between defendant, Powers-Bowers, 'and other.' The 'and others' language was deleted prior to trial. Therefore, the trial did not concern any conspiracy between defendant and Coifman and/or Neff." *State v. Olkon, supra*. Pet. Cert. A-24.

ARGUMENT

I. THE PETITIONER'S AFFIRMATIVE DEFENSE OF ENTRAPMENT WAS PROPERLY REJECTED BY THE TRIAL COURT AND BY THE MINNESOTA SUPREME COURT WHICH CORRECTLY APPLIED THE OVERWHELMINGLY PREVAILING VIEW OF THE DEFENSE AS ENUNCIATED BY THE UNITED STATES SUPREME COURT.

A. The Trial Court Found That No Entrapment Existed.

Beginning July 1, 1975, when the new Minnesota Rules of Criminal Procedure went into effect, the defense of entrapment can be decided by the trial judge or the jury at the election of the accused. In *State v. Grilli*, 304 Minn. 80, 230 N.W. 2d 445 (1975) the Minnesota Supreme Court established this procedure:

> We hold that, following complaint or indictment and at a time prior to the commencement of trial, a defendant shall elect whether to have his claim of entrapment presented in the traditional manner as a defense to the jury, or to have it heard and decided by the court as a matter of law. *Id.* 230 N.W.2d at 455.

In the Federal Courts:

> When the evidence presents no genuine dispute as to whether the defendant was entrapped, there is no factual

> issue for the jury, and the judge has a duty to rule on the defense as a matter of law. (Citation omitted) (*United States v. Jabara,* 618 F.2d 1319 (9th Cir. 1980).[5]

In the instant case, Petitioner elected to submit his claim of entrapment to the trial court which acted as the finder of fact and law. The trial court listened to the appropriate government tapes of conversation between Petitioner and the undercover agent and heard testimony from the Petitioner before making his findings of facts and conclusions of law. At that hearing, the burden was on the Petitioner to raise by a fair preponderance of evidence the issue of entrapment. Once such an issue was raised, the burden then devolved upon the state to prove beyond a reasonable doubt that the Petitioner was predisposed to commit the crimes charged. *State v. Grilli, supra.* 230 N.W.2d at 456. This shifting burden is not unlike that followed in the federal courts where upon the government's introduction of predisposition evidence, a jury question is presented. *United States v. Williams*, 613 F.2d 560 (5th Cir. 1980).

The trial court found as a matter of law:

> Law enforcement officers did not seek out the defendant in our present case. They were engaged in an investigation of other persons, and it was a referral by one of those being investigated which brought the government's agents to the defendant. The undercover officers engaged in no conduct involving persistent solicitation, repeated requests or appeals to sentiment and sympathy in the face of obvious reluctance or hesitancy such as condemned by

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[5] The federal jury instruction as found in 1 E. Devitt and C. Clarkmar, *Federal Jury Practice and Instruction* Sec. 13.13, at 290-91 (2d ed. 1979), has been typical, as noted and approved by this Court in *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1537, 34 L.Ed.2d 355 (1973).

> the Supreme Court decisions, but merely afforded an opportunity to the defendant. The opportunity was offered in defendant's own office, and the *defendant was not led; he chose the path*. The defendant was not entrapped. (Memorandum in Support of Order After Omnibus Hearing.)
>
> (Pet. Cert. A-72). (Emphasis added.)

B. The Minnesota Supreme Court Correctly Followed The United States Supreme Court Decisions.

On appeal the Minnesota Supreme Court in *State v. Olkon*, —— N.W.2d —— (dec. August 29, 1980) (Pet. Cert. A-1 through A-53), the Minnesota Supreme Court applied an entrapment defense consistent with the long-standing majority view of this Court in *Sorrells v. U.S.*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed.2d 413 (1932); *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) and *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1537, 36 L.Ed.2d 355 (1973).

Despite Petitioner's protestations to the contrary, the entrapment concept as set forth in the above and in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), is clearly the prevailing law. There is no "confusion" and "conflict" in the United States Circuit Courts of Appeal to this day. The Minnesota Supreme Court, in *State v. Olkon*, *supra* correctly applied the federal view of the entrapment defense.[6]

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[6] Twenty-six 1980 entrapment cases in the United States Circuit Courts of Appeal were examined. In all twenty-six cases, the courts applied the so-called subjective test as enunciated in *Sorrells, Sherman, Russell,* and *Hampton*. Cases examined were:
United States v. Annese, —— F.2d —— (1st Cir., dec. Sept. 22, 1980)
United States v. Artnsa, 618 F.2d 192 (2d Cir. 1980)
United States v. Bocra, 623 F.2d 281 (3d Cir. 1980)
United States v. Bradsby, 628 F.2d 901 (5th Cir. 1980)

C. Petitioner Was Ready And Willing To Commit The Crimes Of Attempted Theft.

Petitioner seeks to portray to this Court that somehow, out of the blue, government undercover agents descended upon him, a practicing lawyer, and using various illegal methods tricked him into committing the crimes. This picture is not substantiated by the record.

A Hennepin County Deputy Sheriff, assuming the role of undercover agent, was investigating medical fraud cases involving the theft of public funds. He was equipped with a false driver's license, a fictitious name, a false Hennepin County Welfare Assistance Card, a phony police report of an accident, a fake repair bill, and phony insurance policies on himself. The above "tools" were all possessed by "Bowers" *prior* to any connection whatsoever with Petitioner. But none of these fabrications are inducements, they are merely tools for allaying suspicion. As a natural continuation of this type of investigation

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United States v. Brandon, —— F.2d —— (9th Cir., dec. Oct. 22, 1980)
United States v. Caron, 615 F.2d 920 (1st Cir. 1980)
United States v. Carreon, 626 F.2d 528 (7th Cir. 1980)
United States v. Dobson, 609 F.2d 840 (5th Cir. 1980)
United States v. Elordury, 612 F.2d 986 (5th Cir. 1980)
United States v. Fera, 616 F.2d 590 (1st Cir. 1980)
United States v. Geders, 625 F.2d 31 (5th Cir. 1980)
United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980)
United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980)
United States v. Hill, 626 F.2d 1301 (5th Cir. 1980)
United States v. Jabara, 618 F.2d 1319 (9th Cir. 1980)
United States v. Jimenez, 613 F.2d 1373 (5th Cir. 1980)
United States v. Karas, 624 F.2d 500 (4th Cir. 1980)
United States v. Keller, 624 F.2d 1154 (3d Cir. 1980)
United States v. Lentz, 624 F.2d 1280 (5th Cir. 1980)
United States v. Meacham, 626 F.2d 503 (5th Cir. 1980)
United States v. Murzyn, —— F.2d —— (7th Cir., dec. Oct. 3, 1980)
United States v. Navar, 611 F.2d 1156 (5th Cir. 1980)
United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir. 1980)
United States v. Vallencia, —— F.2d —— (2d Cir., dec. Sept. 18, 1980)
United States v. Williams, 613 F.2d 560 (5th Cir. 1980)
United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980)

"Bowers" considered it necessary to ask suspect Nathan Neff for a referral to an attorney. While he rejected the name of the first attorney referred, he nonetheless was given Petitioner's name by suspect Nathan Neff. As part of his investigation into fraud in connection with public funds, he contacted Petitioner in his office. The only added "tools" that "Bowers" used in connection with Petitioner were a delay secured from the Hennepin County Medical Society in their contemplated proceedings against Dr. Coifman and an agreement with the State Farm Mutual and the Travelers Insurance Companies that they would not resist the processing of injury claims to the point of litigation.

The difficulty of detecting consensual crimes—transacted in private with no complaining witnesses—has led this Court to approve the use of decoys, tricks, concealments, deception and other ruses by authorities. *Sorrells v. United States, supra.* These techniques have been accepted by courts to the present. See *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *United States v. Ordner*, 554 F.2d 24 (2nd Cir. 1977); *United States v. Fera*, 616 F.2d 590 (1st Cir. 1980) and *United States v. Bocra*, 623 F.2d (1980).

The Minnesota Supreme Court in *State v. Olkon, supra* correctly identified the two main inquiries in considering an entrapment defense following *Sorrells, supra*; *Sherman, supra*; *Russell, supra*; *and Hampton, supra.* Basically these two questions are: (1) Whether the accused was predisposed to commit the crime charged, and (2) "the extent of the government provision of aid, incentive, and opportunity" *United States v. Goodwin*, 625 F.2d 693 at 697 (5th Cir., dec. September 12, 1980). Petitioner's claim survives neither of the above tests.

In *United States v. Hill,* 626 F.2d 1301 (5th Cir., dec. October 2, 1980) the defendant was convicted of sale of a stolen automobile in violation of 18 U.S.C. § 2313. The government agent, Spillers, a Mississippi Bureau of Narcotics undercover agent posed as a trafficker of stolen automobiles. He met and negotiated with defendant, such conversations being secretly tape-recorded. A few months later defendant procured a stolen car from Illinois which was sold to the agent. The evidence showed that it was agent Spillers who first sought out and contacted defendant and who even proposed the illicit transaction. The Circuit Court held that this inducement was not fatal to the government since the agent had not exerted "persuasion" or even "mild coercion" on the defendant.

In the instant case "Bowers" exerted less inducement than the agent in *Hill.* During their first conversation, "Bowers" told Petitioner that he was not really hurt but that ". . . they wanted him to get something out of it." Petitioner knew from the beginning that he was dealing with a phony injury. "Bowers" inquired—he did not persuade—and he found Petitioner a willing partner. The record is clear that "Bowers" merely presented the opportunity to a "ready and willing" attorney. The taped transcript reveals no evidence that the agent "persuaded," "coerced," "lured," "lulled," "browbeat," "ensnared," or "implanted the criminal design" in the mind of Petitioner. Whenever "Bowers" broached the delicate subject of the impropiety and illegality of the processing of the claims, Petitioner would shut him off in words such as "I don't want to hear about that." No improper inducement on the part of the government agent can be found when the agent himself suggested to the Petitioner: "If you want me to go get another attorney, just let me know."

Was the Petitioner, a practicing attorney without any prior criminal record, "predisposed" to commit the attempted thefts? The defendant in *United States v. Ordner*, 554 F.2d 24 (1977) had no prior convictions. He was not, prior to the incident that led to his conviction, under any surveillance. The court indicated, "to the contrary, he appears to have been a family man with a wife and children, conducting his trade as a professional blaster." *Id.* at 27 The evidence of predisposition is to be found in the conduct of the accused. *United States v. Russell, supra.* In *Ordner* the court found him to be "a willing and indispensable party." The court held that the jury properly found him to have been predisposed in light of his "ready response to inducement." *Id.* at 28. In the instant case, "Bowers" and "Saunders" signed a contingent fee retainer agreement prior to even speaking or seeing Petitioner. In spite of "Bowers" indication that he wasn't really hurt, that he had fooled the doctors, and in spite of his expressed fear to Petitioner that he may get caught, and in spite of his direct offer to seek another attorney, Petitioner pursued the phony claim.

Petitioner sought to explain his statements to "Bowers" such as "you shouldn't have another accident for another five years" by saying that he was just humoring him and that he didn't really mean such statements. The identical claim was unsuccessfully made in *Ordner* where the defendant claimed that he was just "shooting him a line."

Petitioner's claim that he could—with impunity—rely on the medical reports to the effect that "Bowers" had some prior undisclosed back problems is unfounded. Petitioner knew from past experience that Dr. Coifman's reports were contrived. The fact that Dr. Engel believed "Bowers" to have a ". . . minor sprain and nerve root irritation" (Pet. Cert. A-8) was not evidence of injury necessarily occurring in an accident. Petitioner, an experienced personal injury lawyer, avoided inquiry into the proximate cause of the condition reported by Dr. Engel in view of "Bowers'" statement that he had "fooled" everybody while in the hospital.

Petitioner's allegation that police conduct was calculated to convince him that filing claims was "not unlawful" (Pet. Cert. 14) has no basis in the overall record. Petitioner acknowledged to "Bowers" that he, "Bowers", had told him that he wasn't hurt ". . . and that's why I settled for what you asked me to settle for. . . ." (Pet. Cert. A-18). This argument merely alleges that Petitioner lacked the requisite intent to commit the crimes. This claim—inconsistent with entrapment is waived in the federal system, (see *United States v. Hill, supra* at 1306), and was decided against Petitioner below.

D. No Compelling Reasons Exist To Abandon The Subjective Test Of Entrapment.

Petitioner, relying on the dissent by two justices in *State v. Olkon, supra* (Pet. Cert. A-44 to 53) urges this Court to abandon its long-standing subjective entrapment doctrine in favor of the minority objective test. This Court is again being asked to do what it refused to do as recently as 1976 in *Hampton v. United States, supra.* Petitioner notes that in recent years five state courts have adopted the objective test and eleven jurisdictions have done so by statute. He notes the fact that the weight of "scholarly" opinion favors the objective test. *State v. Olkon, supra,* dissent (Pet. Cert. A-51).

Petitioner fails to prove to this Court as to why its position is outmoded. The few departures from this Court's majority position can hardly be considered a ground swell crying for a change. This Court's majority position is followed by the United States Courts of Appeal. In the 1980 Circuit case study (see footnote 6, *supra*) of twenty-six cases, all followed this Court's majority position. While a few of them discussed the various approaches to entrapment, including the due process inquiry, it is quite clear that *Hampton* has settled this question.

Petitioner has not demonstrated any compelling need to reverse *Hampton.*[7] Uniquely, Minnesota incorporates one advantage of the objective test i.e. entrapment rulings are by the judge instead of the jury. *State v. Grilli, supra.* Just as Minnesota was free to adopt this procedure, it is free to adopt—under our federal-state system—its own version of the non-constitutional defense of entrapment. This is especially true when it adopts, as it has done, the view of this Court.[8]

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[7] The objective test is actually less desirable because it would increase the risk of ". . . greater unjust treatment of individual defendants and the possibility of benefits upon police conduct is not strong enough to take the risk." See Park, *The Entrapment Controversy,* 60 Minn.L.Rev. 163 at 170 (1976); Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application,* 1 U.San Fran.L.Rev. 243 (1967).

[8] Had the court applied the minority concept of entrapment Petitioner would not be successful since "Bowers" only provided him the *opportunity* to commit the offense. See Model Penal Code Sec. 2.13 (Official Draft 1962), *United States National Commission of Reform of Federal Criminal Code* Sec. 702(2) (1971) (called Brown Commission Proposal) and *Grossman v. State,* 457 F.2d 226 (Alas. 1969) the first of the five state courts to adopt the minority position by judicial decision.

II. PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner seeks to convince this Court that because his crimes were not contraband offenses, the law in *Hampton, Russell, Sherman,* and *Sorrells* should be inapplicable. Further, Petitioner would have this Court believe that the actions of the government agent "Bowers", manifested such "overinvolvement" that the due process clause of either the Fifth or the Fourteenth amendments should be invoked. Petitioner suggests that his case may be the type of case referred to by Justice Powell in his concurring opinion in *Hampton, supra.* Justice Powell said: "Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses." *Hampton v. United States, supra* at 493.

A. The Law Of Entrapment Should Be Applied Uniformly In All Cases.

Petitioner's urging that the rules of entrapment should be different in his case finds no support in case law. Since *Sorrells, supra,* the defense of entrapment has been invoked in a wide variety of situations. These include: narcotics, liquor, burglary, counterfeiting, price control, gas rationing, selective service, attempted abortion, obscene material, sexual offenses, larceny, fish and game laws, gambling and lotteries, contempt proceedings, bribery, conspiracy, and doubtless other areas. The annotations cited by Petitioner (Pet. Cert. FN. 6, A-25), which Petitioner says demonstrates ". . . the diversity of approaches in noncontraband entrapment and due process cases," reflect only a listing of the diverse types of cases where entrapment has been asserted. These compilations show only that the elements of the defense of entrapment have been employed in the same way regardless of the offense. Petitioner presents no cogent reason why his case is different from any other.[9]

Indeed undercover operations have been permitted where the crime to be detected is committed in secret by consenting parties who are not likely to complain. In principle the privacy of a law office, with statutory protection for a client,[10] provides a better setting than the normal location for consensual crimes, e.g. a street corner. Petitioner's argument that this type of crime is easily detected because "Doctors, lawyers, and insurance companies all keep thorough records on cases" is unconvincing.[11] Seventeen of the twenty-six 1980 cases examined in the Circuit Courts of Appeal (see footnote 6, *supra*) involved narcotics, two involved stolen goods, one involved bribery, one involved illegal wiretap, four involved illegal firearms, and one involved racketeering.[12] In all these cases the subjective test was applied uniformly.

B. There Was No Denial Of Due Process.

Petitioner relies on *dicta* in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) for his claims of violation of due process. In *Archer* the court did not apply the due process standard. The case was decided on the grounds of federal overinvolvement in federal-state relationships even though government agents had participated in perjury. Petitioner can find no support in the case law since *Archer*.

---

[9] The incidence of medical assistance fraud in the United States is rising. See Department of Health, Education and Welfare, *Annual Report*, Office of Inspector General, January 1, 1979-December 31, 1979 (March 31, 1980). Investigations like the one in Petitioner's case are necessary to combat medical assistance fraud.

[10] Minn. Stat. Chap. 595.02(2) 1978.

[11] *State v. Olkon, supra,* dissent (Pet. Cert. 22).

[12] Minnesota initially followed this Court's definition of entrapment in a prostitution case. *State v. Poague,* 245 Minn. 438, 72 N.W.2d 620 (1955).

Justice Rehnquist's opinion in *Hampton*, following *Russell*, *Sorrells*, and *Sherman*, is the overwhelming majority rule. The concept expressed in these cases, i.e. that entrapment is a statutory nonconstitutional defense, is still sound. An excellent summary of the present status of ". . . the close relative of the entrapment defense which may be referred to as the outrageous involvement defense", *United States v. Wylie*, 625 F.2d 1371 (9th Cir. 1980) at 1377, is to be found in *United States v. Lentz*, 624 F.2d 1280 (D.C. Cir. 1980). See also *United States v. Jannotti*, —— F. Supp. ——, 28 Cr.L. 2241 (dec. November 26, 1980).[13]

The cases cited in *Lentz*, *supra*, where courts have *held* that government conduct has been so "outrageous" so as to violate due process have facts manifestly different from those in the instant case. In *Rochin*, cited by the court in *Russell*, *supra*, the defendant was forced to try to vomit the pills and forced to have his stomach pumped. In *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), the government agent directly and continuously created and maintained the criminal operation. In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the defendant was completely directed by the government agent throughout and ". . . contributed nothing in terms of expertise, money, supplies or ideas."

---

[13] In this "Abscam" case the United States District Court for the Eastern District of Pennsylvania applied the due process test. Presumably, this case provides a better factual context for discussing due process than the Petitioner's case, where there was no entrapment, much less a denial of due process.

Petitioner has not shown a violation of a personal right as he must do under *Hampton, supra.*[14] See also *United States v. Meacham,* 626 F.2d 503 (5th Cir. dec. September 26, 1980). This case decidedly is not the case envisaged by Justice Powell in *Hampton, supra.* Petitioner was an experienced attorney with a professional responsibility to conduct his affairs "within the bounds of the law."[15]

Petitioner chose to pursue claims for an injury knowing it to be false. He could have refused to accept the case from the outset. He could have discontinued his representation when that course was specifically suggested to him by the government agent. Petitioner's claim is like that of the "willing" defendant in *United States v. Caron,* 615 F.2d 920 (1st Cir. 1980), who's due process claim provoked the court to conclude:

> We find it hard to think that anyone could believe this to be such outrageous government undercover activity as to violate due process. The only outrage was that defendant was taken in.
>
> *Id.* at 921.

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[14] In *United States v. Nunez-Rios,* 622 F.2d 1093 (2nd Cir. 1980) the court held that because defendant had not asserted "outrageous government inducement" before trial he had lost his right to allege it on appeal, citing Federal Rules of Criminal Procedure 12 (b) (2).

[15] *Code of Professional Responsibility for Minnesota Lawyers,* (Promulgated 1970).

CONCLUSION

This Court should decline to issue a Writ of Certiorari to the Minnesota Supreme Court. Neither the majority nor minority tests for this defense supports Petitioner's claims, and his case is in no way unique. Petitioner has not shown why this Court's long-standing majority position on entrapment should now be discarded. Petitioner has failed to show a violation of his constitutional rights.

This Court should affirm the decision of the Minnesota Supreme Court and the trial court. The question presented does not merit the attention of this Court.

Respectfully submitted,

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No. 80-878

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ELLIS OLKON,
Petitioner,
vs.
STATE OF MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota

MOTION OF THE MINNESOTA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, AND BRIEF AMICUS CURIAE

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Question Presented

That the fundamental due process right to a fair and impartial trial requires that where the Court conducts a hearing to determine whether extraneous prejudicial information was improperly brought to the jury's attention, that the Court question all implicated and available jurors and inquire into the facts about what was said, not simply into the juror's conclusions about whether prejudice was experienced, especially in circumstances where:

Evidence from several sources indicated that anti-Semitic remarks and other prejudicial comments were made by trial jurors. One of the jurors indicated that it was "an older man" who had made the anti-Semitic remarks. Another juror indicated that "an older man on the jury" had expressed his opinion that petitioner was guilty even before the commencement of the deliberations.

MOTION OF THE MINNESOTA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, AND BRIEF AMICUS CURIAE

The Minnesota Civil Liberties Union respectfully moves, pursuant to Rule 36 of this Court's Rules, for leave to file the within brief *amicus curiae*. Counsel for both the petitioner and the respondent have consented to the filing of this brief.

The Minnesota Civil Liberties Union is a private, nonprofit, membership-only organization having approximately 3,000 members in the State of Minnesota. Its purpose is the protection of the rights and liberties preserved by the Minnesota and United States Constitutions. It is a statewide affiliate of the American Civil Liberties Union.

The Minnesota Civil Liberties Union fully recognizes that the petitioner relies primarily on entrapment issues in its petition for a writ of certiorari and probably as a result of space limitations limits the juror misconduct issue to its statement of case (see p. 13, Petition for a Writ of Certiorari).

The Minnesota Civil Liberties Union believes that our constitutional system—which includes both the right to a fair trial and due process—is better served by a fair and full investigation of possible religious or racial discrimination by jurors (see dissents of Justices Yetka and Wahl, p. A-53, Petition for a Writ of Certiorari).

It is to present this analysis that *amicus* respectfully moves for leave to file this brief.

Respectfully submitted,

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Constitutional Provisions

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment XIV Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Interest of Amicus

The interest of *amicus* appears from the foregoing motion.

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-878

ELLIS OLKON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota

STATEMENT OF THE CASE

The case presents the unusual circumstances of an attorney being ensnared in an elaborate, police-contrived scheme incident to an investigation of a doctor and his business manager suspected of welfare fraud.

Subsequent to the conviction of Petitioner of attempted theft, Mr. Tom Matthews, an investigative reporter for KSTP-TV in Minneapolis, informed the trial court, by correspondence, that he was informed by two of the jurors that anti-Semitic remarks were made during the deliberations in Petitioner's case.

His letter is reproduced below.

KSTP TELEVISION
3415 University Avenue
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612/645-2724

November 8, 1979

The Honorable Douglas K. Amdahl
Hennepin County District Court
Room 1856
Hennepin County Government Center
Minneapolis, Minnesota 55487

Dear Judge Amdahl:

I was assigned to cover the Ellis Olkon trial for KSTP-TV. During the course of that assignment, some information came to my attention that I want to share with you.

Following the Olkon verdict, I wondered how the jury had fared in sorting out the various options available for their finding. In addition, I heard from at least two sources—I don't wish to identify them—that some anti-Semitic remarks may have occurred while the jurors were deliberating.

With that in mind, I proceeded to contact some of the jurors so I could get a feel for how they reached their verdict. This took place, of course, after your honor had dismissed the panel.

One of the Jurors, Mrs. Joan Gary, told me by telephone that she felt uncomfortable with the way the verdict was reached. When I asked her why, she indicated there was some unpleasantness in the jury room. I also asked her if she heard any anti-Semitic remarks. She indicated she had heard such a remark.

When we concluded our phone conversation, I came away believing that Mrs. Gary had the opinion that one or more of the jurors had indicated a pre-conceived notion above Olkon's guilt even before considering the trial evidence. In fairness, I must point out that Mrs. Gary did not tell me her vote was influenced by any remarks she heard. At best, she regarded the reported anti-Semitic remarks as silly and crass. She did not know the juror's name and was able to identify him only as an older man.

Another juror, Mr. Gary Martinson, generally agreed with Mrs. Gary's recall of events in the jury room. I asked him about anti-Semitic remarks. His reply: "If there was a remark, as I remember, it was only a joke. There may have been one (a remark of that nature)."

Mr. Martinson also told me he believes that "an older man" on the jury—Martinson does not recall his name—expressed his feelings about Mr. Olkon's guilt at the immediate onsent of the deliberations. "He had him (Olkon) guilty before ever looking at it all (the evidence)," Mr. Martinson told me in a phone conversation. "The old guy—my opinion was he (the older man) wanted to get him (Olkon). He said the older man remarked to the jury that Olkon could have avoided his difficulty by "checking out his (Bower's) I.D., or by going to his apartment to learn whether he really lived there.". In addition, Mr. Martinson said he had heard from other jurors that the older man wished to find Olkon guilty from the "very beginning."

It is not my wish, your honor, to inject myself into this matter, since my assignment requires me to cover the remaining, related trial in this matter. But my high regard for your even-handed conduct of the Olkon trial persuades me that these matters must be brought to your attention.

I am aware that Mr. Olkon probably will be asking for a new trial. I am equally cognizant of the delicate nature of jury deliberations while arriving at verdicts. But I would be remiss in not making your honor aware of what I have learned; otherwise, your thoughtful instructions and admonitions to the jury about a fair trial would take on a hollow ring. On other matters, the courts and the media might disagree. On this—the right to an impartial trial based only on the evidence available—I am sure we are in accord.

Thank you for taking the time to read this. I shall be available at the numbers on the attached card should the court need clarification or have further questions.

Respectfully

TOM MATTHEWS
Investigative Reporter/
KSTP-TV

At about the same time, the father of one of the jurors, Mr. Richard Cox, voluntarily came forward with the information that his daughter, Joan Gary, had observed anti-Semitism during the jury deliberations. He made these remarks to Petitioner's attorney while in his law office on a legal matter unrelated to Petitioner's case. He signed an affidavit setting forth the facts which is reproduced below.

(Caption.)

AFFIDAVIT OF RICHARD COX

State of Minnesota
County of Ramsey—ss.

Richard Cox, being first duly sworn, deposes and says that he is a professional engineer and recently brought to the attention of Theodore J. Collins, one of defendant Ellis Olkon's attorneys, the fact that he is the father of Joan Gary, one of the jurors who heard the above captioned case. That your affiant talked to his daughter about the matter on at least two occasions and was told that she was very disturbed by the proceedings.

Your affiant was told by his daughter that in her estimation the jury imposed a higher standard of care on the defendant Olkon that upon the normal defendant. In addition, your affiant was told by his daughter that there was anti-Semitism experienced by her during the time of the jury deliberations based upon statements of fellow jurors.

Further, your affiant was told by his daughter that the jurors did not deliberate with one another and that only she and one or two others actually reviewed the evidence and that she and the others who did review the evidence endured long periods of silence from the other jurors.

Further, your affiant was told by his daughter that she had the impression that the minds of many of the jurors were made up as soon as certain evidence had been heard by them, to-wit: the tapes. That your affiant's daughter was told, "you have heard the tapes, what other conclusion can there be."

Further, your affiant was told by his daughter that it was unlikely that any of the jurors involved in the matter would admit the true facts of what was apparent to his daughter as being expressions of disapproval of the ethnic background of the defendant and for that reason, she did not immediately make known to the court or anyone else the improprieties which she feels she observed.

Further, your affiant saith not.

RICHARD COX

Petitioner's attorney also learned that an attorney, James Hunter, had overheard a conversation between a juror and his employer which took place during the trial, and which suggested the possibility that the employer pressured the juror into voting for a guilty verdict. The employer, upon learning that the juror would not be finished with the case for at least "a couple of more days," stated, "hang the guy and get it over with," to which the other juror replied, "sure, George." (See Appendix, p. 1)

As a result of these indications of possible jury misconduct, Petitioner moved the trial court for a hearing pursuant to *Schwartz v. Minneapolis Suburban Bus*, 258 Minn. 325, 104 N.W.2d 301 (1960). The trial court granted a hearing but denied several of Petitioner's requests relating to the conduct of that hearing.

Petitioner requested that all jurors be questioned by the trial court. Since the Matthews letter said an "older" male juror had made an anti-Semitic remark, the trial court suggested that Mr. Peterson, one of the two older men, be called. Petitioner requested that Mr. Lund, the other older male juror, be called as well. The trial court selected six jurors to be questioned. The six included Joan Gary. However, the letter requesting that they appear and testify was sent to five jurors, not including Mrs. Gary, "through some inefficiency of the Court." (See Appendix, P. 4) Mrs. Gary was questioned three days after the other five jurors appeared in court and after their remarks were quoted extensively in the local media. Mrs. Gary's statements to the court were substantially modified from her earlier remarks to her father that included the information that she had not come forward with her feelings about the jury misconduct earlier because she had concluded that no one would believe her. In addition to Mrs. Gary, one of the older men, and the two jurors referenced in the Hunter affidavit and the Matthews letter, the trial court called the jury foreperson and one other juror selected at "random."

Petitioner additionally requested that the scope of the court's inquiry be expanded to include the question of whether any jurors mentioned Petitioner's religious or ethnic background. The court denied this request and limited the questioning to each juror's conclusions of whether anti-Semitism had been expressed.

It is not in dispute that the jurors had been extensively questioned on voir dire with regard to their impartiality and freedom from prejudice of any kind.

The trial court found no evidence of jury misconduct after a brief hearing.

ARGUMENT

I.

THIS CASE PRESENTS SERIOUS QUESTIONS OF FEDERAL AND STATE LAW WHICH HAVE NOT BEEN SETTLED BY THIS COURT: THE CONSTITUTIONAL IMPLICATIONS OF PROPER INQUIRY AT A JURY MISCONDUCT HEARING, WHERE RELIGIOUS OR RACIAL DISCRIMINATION MAY HAVE AFFECTED THE DELIBERATIONS IN A CRIMINAL CASE.

The trial court properly granted a jury misconduct hearing in the instant case as required by both Minnesota and federal case law. *Schwartz v. Minneapolis Suburban*

Bus, supra; *Turner v. Louisiana*, 379 U.S. 466 (1965); *Parker v. Gladden*, 385 U.S. 363 (1966).

The *amicus* maintains that the trial court erred in making an arbitrary decision to call six jurors and not all twelve for questioning at the jury misconduct hearing and especially to have neglected to have called both of the older male jurors. At the hearing on the motion requesting the hearing, the trial court referred to Mr. Peterson as the oldest juror and as an appropriate juror to be called, but then inexplicably failed to call him for the hearing. Rule 26.03, subd. 19(6) of the Minnesota Rules of Criminal Procedure uses the term "jurors", and clearly indicates that a sufficient number of jurors should be called so that the defendant will be afforded a full, complete and fair inquiry into any possible misconduct. As stated above, such inquiry is compelled in view of the serious and immediate consequences to be suffered by a defendant as a result of an adverse verdict in a criminal trial. The *amicus* maintains that the trial court erred in making this arbitrary decision in view of the lack of a definitive description of the individual juror mentioned in the Matthews letter. In view of the seriousness of the matter to be investigated by the trial court and the lack of any definitive identification of the jurors actually involved in such misconduct, a full and comprehensive inquiry into the matter could only be accomplished by the calling of either all twelve jurors for questioning by the trial court regarding possible misconduct, or at least all jurors that are available. The failure to call, at a minimum, one of the jurors most strongly implicated in possible misconduct was a clear abuse of discretion. Indeed, in view of the seriousness of the result, it is a small inconvenience and expenditure of time to require that all jurors be examined.

Dissenting Justices Yetka and Wahl support this view, as stated in their opinion:

> ". . . there was evidence submitted to the trial judge that anti-Semitic remarks were made during jury deliberations. . ."
>
> ". . . I would think that we ought to interpret the rule to provide that where religious or racial discrimination may have affected the deliberations, all jurors that are available ought to be questioned, particularly in a criminal case." (See Petition for a Writ of Certiorari, p. A-53.)

The trial court and the majority opinion below rely on Rule 606 (b) of the Minnesota Rules of Evidence (same as the Federal Rule). The rule states, in part, as follows:

> ". . . except that a juror may testify on the question *whether extraneous prejudicial information was improperly brought to the jury's attention* or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." (Emphasis supplied.) (See pp. A-42 and A-43 of Petition for a Writ of Certiorari.)

Reliance on an interpretation of this rule to allow arbitrary selection of the jurors to be questioned or to allow limitation of the scope of inquiry to juror's conclusions rather than facts, is irreconcilable with prior decisions of this and other courts. In *Tobias v. Smith*, 466

F. Supp. 1287 (1979), as here, prior to trial prospective jurors were subjected to extensive voir dire by Petitioner's attorney. The case involved a black defendant in a criminal case where identification of the defendant was the most essential issue before the jury. The issue of jury misconduct was raised by the affidavit of a juror who quoted the jury foreman as saying that it was unimportant that the witnesses could not identify a photo of defendant because "You can't tell one black from another. They all look alike." (Id. at 1289). Another juror asserted that the jurors should take the word of two white victims, as opposed to a black defendant.

The Court in *Tobias* considered the conflicting public policy considerations involved in the issue of impeaching jury verdicts. Additionally the Court considered the question whether the alleged comments merited further inquiry to determine if they may be evidence of the kind of extraneous influence improperly brought to the jury's attention as contemplated by the Rule. The Court concluded in the affirmative, that ". . . the statements in the juror's affidavit are sufficient to raise a question as to whether the jury's verdict was discolored by improper influences and they are not merely matters of jury deliberations." (Id. at 1290). The Court in *Tobias* also notes that:

> "In addition to consideration of Rule 606(b), the sixth amendment guarantee of a fair trial to a criminal defendant injects a constitutional element into the evidentiary question. See, e.g., *Parker v. Gladden*, 385 U.S. 363 (1966). As noted by the New York Court of Appeals, when the Supreme Court has held 'that a particular series of events, when proven, vio-

> lates a defendant's constitutional rights, implicit in that determination is the right of the defendant to prove facts substantiating his claim.' See *People v. DeLucia,* 20 N.Y.2d 275, 278, 282 N.Y.S.2d 526, 528, 229 N.E.2d, 211, 213 (1967). Whatever the scope of a jurisdiction's non-impeachment rule, a court determination of whether particular jury events are open or closed to inquiry must consider a defendant's sixth amendment rights to confront witnesses, to the assistance of counsel, and to an impartial jury. See *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Parker,* supra, at 364, 87 S.Ct. 468, 17 L.Ed.2d 420; *People v. Leonti,* 262 N.Y. 256, 186 N.E. 693 (1933).

The petitioner in this case was denied an adequate opportunity to prove the facts substantiating his claim because, although the court granted a hearing to inquire into jury misconduct, the scope of that inquiry was so severly limited as to make the full disclosure of facts essential impossible.

In *State v. Levitt,* 36 N.J. 266, 176 A2d 465 (1961), the mere mention of defendant's religion and the religion of some of his character witnesses, by the jury during deliberations, was determined by the court to be grounds for setting aside the verdict. In that case the defendant, as here, was Jewish. The trial court in *Levitt* granted a new trial on juror affidavits alone, on the grounds that ". . . somebody for some reason injected the question of this man's religion, and apparently the religion of many of his character witnesses, into the deliberations of the jury." (See Anno., Disclosure in criminal case of juror's political, racial, religious, or national origin prejudice against accused or witnesses as ground for new trial or reversal, 91 A.L.R.2d 1112.)

The *amicus* therefore maintains that the allegations in the Matthews letter and Cox affidavit regarding the predisposition of an older juror were sufficient grounds to widen the scope of the inquiry by the Court to all of the jurors and beyond interrogation regarding jurors' conclusions of anti-Semitic bias to include if actual information as to whether any mention was made of Petitioner's religion.

Counsel for Petitioner best concluded his request for a juror misconduct finding by stating on December 18, 1979 the following: ". . . It is not reasonable to think that two jurors could independently come to the conclusion that there was an injection of anti-Semitism without there being some cause. That is as difficult as to think that the footprint on the sands of the shore is not made by a human foot . . . I don't see how the Court can ignore the fact that a common series of events generally has an author."

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

(Caption)

AFFIDAVIT OF JAMES HUNTER

State of Minnesota
County of Hennepin—ss.

James Hunter, being first duly sworn, deposes and says that he is an attorney licensed to practice law in the State of Minnesota.

That while he was working with a client at Chester's Restaurant on a Thursday afternoon in September, 1979, he had occasion to overhear a conversation involving a person whom he later learned was a juror in the above captioned trial.

That while he was seated in the restaurant a person then unknown to him but whom he later learned to be named Gregory B. Rien, came by and was addressed by your affiant's client. That your affiant's client said to Mr. Rein, "where have you been—it's about time that you got here", or its equivalent. That further, a client stated, "are you almost finished", to which Mr. Rein replied, "it looks like a couple of more days." The final words of the conversation were by the client, "hang the guy and get it over with", to which the juror made the reply, "sure, George."

That later your affiant learned that the discussion had taken place between a juror, to-wit: Rien, and his employer and involved the Ellis Olkon trial and that your affiant makes this Affidavit at the request of the attorney for the defendant, Ellis Olkon. That the discussion took place about 2:00 p.m. on a Thursday in September, the exact date of which your affiant is at present unaware. That your affiant has set down the conversation to the best of his present recollection.

Further, your affiant saith not.

JAMES HUNTER

(Caption)

ORDER

The above-entitled matter came regularly on for hearing before the undersigned on December 18, 1979 on motion of defendant for an order "granting a new trial and/or judgment of acquittal" as set forth in defendant's motion filed herein on October 5, 1979, his memorandum in support of said motion filed December 12, 1979 and his letter under date of December 11, 1979 and filed December 13, 1979 expanding on the memorandum.

Theodore J. Collins, Esq., appeared for and on behalf of defendant, and Daniel F. Byrne, Esq., Assistant Hennepin County Attorney, appeared for and on behalf of plaintiff.

Upon all the files, records and proceedings herein, and upon the arguments of counsel and the memoranda submitted, IT IS ORDERED:

That defendant's motion be, and hereby is, denied in all things.

That the sentencing of the defendant herein be, and hereby is, set for January 9, 1980 at 9.00 o'clock a.m.

in Courtroom 1856, Courts Tower, Government Center, Minneapolis, Minnesota.

Dated: December 27, 1979.

By the Court:

DOUGLAS K. AMDAHL
Judge of District Court

Let the attached Memorandum be made a part hereof.

JUROR MISCONDUCT

Defendant has alleged misconduct of the jury as a ground for his present motion. The Court has set forth in a Memorandum supporting its Order granting a "Schwartz" hearing the basis for defendant's allegations.

The Court requested six of the twelve jurors to appear for questioning concerning alleged statements indicating religious bias. Two of the six were jurors named in documents filed with the Court (a letter from Mr. Matthews—a TV investigator—and an affidavit of the father of one of the jurors) reciting alleged anti-Semitic conduct. A third juror was one who was named in an affidavit filed concerning a lunch-time contact with his employer, and, because his presence was needed to question him on that event, was also to be one of the jurors to be questioned about the anti-Semitic allegation. A fourth was one of the oldest jurors who was selected by the Court because Mr. Matthews' letter referred to "an older man" as a source of a statement indicating bias. The fifth juror was the foreperson of the jury, and the sixth was chosen at random from the remaining jurors to bring to 50% the jury representation at the hearing.

The defendant now—and at the hearing—complains that all of the jurors should have been questioned as to religious bias. The Court is of the opinion that since none of the questioned jurors heard any anti-Semitic statements (five said there were no such statements and one said he didn't hear any if there were any), there has been a sufficient inquiry made and that inquiry established that there was no improper juror or jury conduct.

The Court received the letter of Mr. Matthews on November 9, 1979. The Court immediately made copies of that letter and sent a copy to each of defense and prosecution counsel on the same date. Witthin a week defendant filed and served his motion for a "Schwartz" hearing and in support thereof submitted two affidavits alleging juror misconduct and referred to Mr. Matthews' letter. The motion was heard November 26, 1979 and on November 27th the Court issued its Order, together with its Memorandum granting the motion.

The "Schwartz" hearing was scheduled for December 10th and the six jurors were requested to appear for questioning. Five of the six, appeared and were questioned. The sixth juror did not appear because, through some inefficiency of the Court, she had not received a note of the date and time for the hearing. The latter juror did appear December 13th and was then questioned.

The Court had limited the questions by counsel to the six jurors to matters alleged in the affidavits and Mr. Matthews' letter, and for those matters further limited the area of questioning to Rule 606(b) R.Evid. parameters to ". . . whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . ."

Defendant's counsel requested on December 10th that he be permitted to go beyond the rule in his questioning, and the Court denied the request.